UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

GM MECHANICAL, INC. AND STILLWATER SERVICES, INC., JOINT EMPLOYERS

and

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 162, AFL-CIO

CASES 9-CA-40646
9-CA-40681
9-CA-40756
9-CA-40845
9-CA-40873
9-CA-40933
9-CA-40954
9-CA-41003
9-RC-17840

David Ness*, *Esq.* and *Eric Gill*, *Esq., for the General Counsel.
Paul Long and Richard W. Gibson, Esq., for Charging Party Union.
Douglas C. Anspach*, *Jr., Esq., for the Employer.

DECISION

Statement of the Case

MARGARET G. BRAKEBUSCH, Administrative Law Judge. This case was tried in Dayton, Ohio on November 3, 4, 5, 15, 16, 17, and 18, 2004, pursuant to an Order Consolidating Cases, Amended Consolidated Complaint And Order Rescheduling Hearing that issued on September 10, 2004.[1] The Amended Consolidated Complaint is based upon a number of unfair labor practice charges filed by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 162, AFL-CIO, herein Union, as captioned above. The charges involve numerous

[1] On October 20, 2004, and prior to the opening of the hearing, the Regional Director for Region 9 of the National Labor Relations Board, herein Board, issued Amendment To Amended Consolidated Complaint And Order Withdrawing The Amended Consolidated Complaint As It Relates To The Charge In Case 9-CA-40933 And The Portion Of The Charge in Case 9-CA-40954 Alleging The Failure To Hire Andrew Kendrick.

alleged unfair labor practice violations of the National Labor Relations Act, herein Act, that purportedly occurred between August 2003 and January 30, 2004,[2] in connection with the Union's organizing campaign involving the employees of GM Mechanical, Inc., and Stillwater Services, Inc.,[3] herein the Employer. Specifically, the amended consolidated complaint alleges that during the pertinent time period, the Employer terminated the employment of Mark Eaton and Joshua Lee and reassigned Jerry Fegel and Martin Chambers to more arduous and less agreeable job assignments because of their support for the Union and in violation of Sections 8(a)(1) and (3) of the Act.[4] The Amended Consolidated Complaint also alleges that in September 2003 and January 2004, the Employer refused to hire and refused to consider for hire Kelly Brennan, Greg Bush, Scott Shouse, Victor Tanner, Anthony DeBrosse, Matt Seibert, Walter Lipinski, and Mike O'Hearn.[5] The Amended Consolidated Complaint also alleges 39 independent incidents in which the Employer is alleged to have engaged in conduct that interferes with, restrains, and coerces employees in the exercise of rights guaranteed by Section 7 of the Act in violation of Section 8(a)(1) of the Act.

Case 9-RC-17840 involves a Board conducted representation election on October 31, 2003, that was held pursuant to a stipulated election agreement approved by the Regional Director for Region 9 on October 2, 2003. The Tally of Ballots disclosed that 15 votes were cast for the Union and 17 votes were cast against the Union. While there were no void ballots, there were 19 challenged ballots. On November 5, 2003, the Union filed objections to the election. Following an investigation of the issues raised by the challenged ballots and the Objections to the Election, the Acting Regional Director for Region 9 of the Board issued a Report on Challenged Ballots And Objections To Election, Recommendations To The Board, Order Directing Hearing, Order Consolidating Cases, Order Transferring Cases To The Board And Notice of Hearing on July 22, 2004. In the Order, the Regional Director ordered that 16[6] of the Union's objections and 17 of the challenged ballots be resolved through hearing before an administrative law judge. On August 27, 2004, the Board issued a Decision And Order, adopting the Regional Director's findings and recommendation.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel, the Union, and by the Employer, I make the following:

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[2] Inasmuch as the majority of unfair labor practices are alleged to have occurred in 2003, all dates refer to 2003 unless otherwise indicated.

[3] In its answer, the Employer admits that GM Mechanical, Inc. and Stillwater Services, Inc. have been joint employers of the employees working on the various projects and jobs of the Employer.

[4] The Amended Consolidated Complaint also alleges that about October 1, 2003, the Employer opened an employees' exercise room in violation of 8(a)(1) and (3).

[5] The Amended Consolidated Complaint initially alleged that the Employer refused to hire and refused to consider for hire Sewell Smith, Andrew Kendrick, and Richard Royer. Counsel for the General Counsel withdrew the allegation with respect to these individuals by its October 20, 2004, Amendment to the Amended Consolidated Complaint and by verbal withdrawal on November 15, 2004.

[6] Union objections 1,2,3,10,14,19,25,22,26,27,28,31,36,37,42 and 44 are coextensive with paragraphs13 (d), 7(d), 11,13(e), 7(a), 7(e), 7(g),8(c)(i),8(d)(i),8(h),8(j), 12,7(b), 6(e)(i), 6(f)(i)(ii), 6(g), 6(j), 6(k), 6(m), 7(f),8(a),8(b),8(c)(ii),8(d)(ii),8(e),8(i), 7(d), 6(e)(ii),8(f), 9(b), 6(e)(ii),8(f), 9(b), 7(c), 6(h), 6(l), 7(h), 8(g), and 13(b) respectively.

Findings of Fact

I. Jurisdiction

The Employer, a corporation, has been engaged as a contractor in the construction industry doing commercial and office construction at its facility in Covington, Ohio, where it annually purchases and receives goods valued in excess of $50,000 directly from points outside the State of Ohio. The Employer admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

The Employer is a mechanical contractor that installs plumbing systems on construction projects and also installs and services heating, ventilation, and air conditioning systems. Gerald Miller has been the president, CEO, and sole owner of GM Mechanical, Inc. since 1985. Prior to 1985, Miller was the owner of Gerald Miller Plumbing, Inc., a sole proprietorship. When Miller began the business in 1975, he was 19 years old and the business involved only plumbing, service, and residential work. The name of the business was changed in 1985 to better reflect that the business also included other work including sheet metal and heating. The business has grown from approximately 20 to 40 employees in 1985 to approximately 70 to 80 current employees. Located in Covington, Ohio, the Employer provides work within a radius of 50 miles of Dayton, Ohio and in Southwest Ohio. Since approximately 2001, Miller's son, Lance Miller, has served as Vice-President of Operations. Lance Miller has worked at the Employer's facility since 1992 or 1993 and is in overall charge of the construction employees who work in the field. In 2003, Hannah Miller, Gerald Miller's daughter, began working as a receptionist. Her duties have expanded since her employment and she performs payroll and human resources functions when needed. As receptionist, Hannah Miller disperses employment applications to applicants who come to the Employer's facility.

The Employer's main office is located in a 30,000 square foot facility. The Employer has a sheet metal department, a plumbing division, and a service/HVAC division. The facility contains both a pipe fabrication (herein fab) shop and a sheet metal fab shop. The Employer installs HVAC systems from beginning to finish, as well as systems maintenance and associated plumbing. The pipe fab shop began operation approximately February 2003. Lance Miller acknowledged that while the pipe fab shop is set up to do both plumbing and piping, little plumbing has been done thus far. Miller explained that any pipe cutting that can be done in the field could also be done in the fab shop. The sheet metal fab department makes all the ductwork that is used on the job. The pipe fab shop makes all of the piping and plumbing apparatus.

Until November 2003, Tim Stewart served as field superintendent with responsibility for both the sheet metal operation, as well as plumbing and pipefitting. In November 2003, Steve Storck became the field superintendent for the plumbing and piping operation. During late summer and fall of 2003, Mark Dinlinger, Jamie Cronebery, and Allen Razor served as project managers for the Employer. Project managers are responsible for the management

of a job once the Employer has successfully bid a job. One of the responsibilities for the project manager is to attend the weekly job meetings with the construction manager and supervisor for the general contractor. Because the project manager is responsible for running the job for the Employer, he is involved in planning and scheduling employees to work on the specific job. Based upon the recommendations of the project managers, the superintendent determines the number of employees who are assigned to the job. Chronabery testified that Brian Crail supervised the sheet metal shop and Rod Cremeans supervised the pipe fab shop. Dick Popplemeier was the supervisor for the service department.

The Employer has been involved in plumbing since its inception and involved in sheet metal work since 1980. Neither the Employer's plumbing nor sheet metal business has ever been affiliated with a union. Gerald Miller acknowledged that in the mid-90's, the "sheet metal or pipefitters" union attempted to organize his Columbus facility and also filed an unfair labor practice charge. As a result of the charge, a hearing was held before an administrative law judge. Administrative notice is taken of the Board's decision in *GM Mechanical, Inc*., 326 NLRB 35 (1998), in which the Board affirmed the administrative law judge in finding that the employer terminated three employees in violation of 8(a)(1) and (3) and because of their activities in support of the Sheet Metal Workers Union.

B. 8(a)(1) Conduct Alleged to Have Occurred Prior to the October 31, 2003 Election

1. 8(a)(1) Allegations Attributed to Gerald Miller

Gerald Miller acknowledged that he felt that it was in the best interest of his company to remain non-union. He testified that he first learned of the Union's presence on his job sites in early September. The parties stipulated that on or about September 4, 2003, and before September 9, 2003, Gerald Miller learned that the Union had visited the Southdale job site. In the amended consolidated complaint, General Counsel alleges 12 incidents between early August 2003 and October 15, 2003 in which Gerald Miller is alleged to have interrogated employees about their union sympathies and activities and those of other employees. During the same time period, Miller is alleged to have asked an employee to ascertain and disclose the union sympathies and activities of other employees. The amended consolidated complaint also alleges that on or about early September 2003, Gerald Miller told an employee the identity of other employees who were engaged in union activities and thereby created an impression among its employees that their union activities were under surveillance by the Employer. The complaint further alleges that during this same time period, Gerald Miller threatened that the Employer would shut its doors and discontinue the plumbing shop if the employees selected the Union as their bargaining representative. Additionally, on two occasions, Miller is alleged to have told applicants that the Employer was not hiring because of union organizational activities.

Jerry Fegel worked for the Employer as a journeyman plumber from May 2003 until he quit in March 2004. Fegel recalled that in late July or the first of August, Gerald Miller telephoned him at home and inquired how the job was going. During the conversation, Miller asked if he knew that Martin Chambers and Barry McCormick had spoken with some members of the Union. Fegel told Miller that he had heard rumors, however, he didn't know. Fegel also recalled that Miller asked him if he knew the identity of the "mole." Fegel explained that he was caught totally off guard by the question and didn't know what Miller

meant by the question. When he asked Miller to explain, Miller told him that a mole was "somebody working for the Company representing the Union." Fegel explained that because he really didn't know at the time, he told Miller that he wouldn't put much merit into that.

Gerald Miller acknowledged that he had a telephone conversation with Fegel after September 13, 2003. Miller asserted that Fegel telephoned him toward the end of the workday. Miller testified:

> And at the time he was working on the Brentwood School Project, and he called me and made some comment about the Union, whether - - you know, whether I knew anything that was going on, and whatever, and offered to meet at a bar, and which I declined. And he said, well, he said, you want to call me later at home, he said, give me a call.

Miller recalled that he later telephoned Fegel at home and spoke with him for about ten minutes. Miller did not deny that he interrogated Fegel about his and other employees' union activity.

David McFadden worked for the Employer from August 12, 2003, until March 2004. Prior to his beginning work on August 12, he met with Gerald Miller at the Tri-Village School work site. McFadden told Miller that he could not accept an hourly wage rate of less than $20 because that was his current wage rate. McFadden testified that while he had previously worked for the Employer, he quit after approximately 8 months. When Miller spoke with McFadden about returning to employment, he explained that because he was not comfortable with the requested $20 an hour wage rate, he would put McFadden on a three week trial period without benefits. McFadden agreed. McFadden testified that near the end of the conversation, Gerald Miller asked him if he were a member of the union. McFadden responded that he was not but inquired why Miller was asking. Miller then explained that union representatives had visited the job sites.

Misty Addis, who lives with David McFadden, testified that approximately two weeks after the Employer hired David McFadden, she also inquired about employment. Addis testified that while she had no experience in construction, she had hoped to get her "foot in the door" and learn a trade. She telephoned Gerald Miller and asked if he were hiring. Addis testified that Miller told her that the Employer was not going to do any more hiring until "they got all the union stuff settled." David McFadden testified that he had been present when Addis telephoned Miller. He explained that because he was sitting next to her on the couch, he could overhear Miller as well as Addis. McFadden recalled that Miller stated that he wasn't hiring at the time because of the union activity. Addis testified that she spoke twice more with Miller concerning employment. When she telephoned Miller a few days later, Miller again told her that he was not hiring and "they were still having problems with their voting for their union and stuff." When Addis telephoned Miller again in January 2004, he confirmed that he had no positions open. Miller denied that he had ever spoken with Addis.

McFadden testified that after he completed the three-week trial period, he telephoned Miller to inquire when he would be hired with benefits. Miller told McFadden that he was not going to hire McFadden at that time because of the existing union activity.

Aaron Flick worked for the Employer from mid-July 2003 until he quit in November

2003. Flick recalled that he worked at the Tri-Village jobsite in early September 2003. During a visit to the jobsite, Gerald Miller asked him what he thought about the Union and also asked if anyone had spoken to him about it. When Flick told him that he had not heard anything about the Union, Miller told him that if the Union "were to come in to GM," he would close the plumbing shop. Flick also recalled that approximately a week later, he saw Miller at the Employer's office. Flick spoke with Miller outside the front office with no one else present. During the conversation, Miller asked him what employees at the Tri-Village jobsite were involved with the Union. Flick recalled Miller's saying that it was his company and he had a right to know. Flick did not testify as to whether he responded to Miller or whether anything else was said in this conversation or even how this conversation came about.

David McFadden testified that during the middle of September, Gerald Miller telephoned him after he had returned home from work at the Employer's Tri-Village work site. As no other foremen were working on the job site that week, McFadden described himself as the "per se" foreman. While Miller initially inquired how the work was progressing, he also asked McFadden if the employees were talking about who they were going to vote for in the union election. McFadden told him that there wasn't a lot of talk about the union election. When Miller then asked him if he were going to vote for or against the Union, McFadden told him that he was undecided. Misty Addis testified that she answered the telephone when Miller called. After handing the telephone to McFadden, she sat next to him while he spoke with Miller. Addis explained that the telephone is maintained on high volume because McFadden's father lives with them and he has a hearing impairment. She confirmed that for that reason, it is easy to hear both parts of telephone conversations. She recalled that Miller talked about how things were going at the jobsite before asking McFadden how he and other employees were going to vote in the union election. One of the other employees mentioned was McFadden's father, David McFadden, Sr., who also worked for the Employer.

William Don Sturgill worked for the Employer as a plumbing foreman from December 2001 until he quit in June 2004. In late August or early September 2003, Sturgill worked at the Employer's Tri-Village jobsite. Sturgill testified concerning a conversation that he had with Gerald Miller during a walk-through inspection at the jobsite. Sturgill recalled that Miller took him into a room of the new section of the school they were building and talked with him without anyone else present. Miller asked Sturgill if any Union organizers had approached him. Sturgill told Miller that there had been an organizer present at the jobsite the previous week and confirmed that union representatives were going to different jobs. Miller then asked Sturgill if he knew what employees were talking with the Union. When Sturgill explained that he really didn't know employees' names, Miller specifically mentioned the names of Martin Chambers, Jerry Fegel, and Barry McCormick. Sturgill did not explain however, whether he identified these individuals as having contact with the Union. Miller testified that while he learned of the Union's presence on the job from other contractors, Sturgill was the first employee who discussed the Union's activity with him. Miller recalled that when he visited the Tri-Village jobsite on September 13, Sturgill pulled him aside and took him into another part of the building where they spoke for well over an hour. Miller did not deny that he interrogated Sturgill about the Union representatives visits or about the employees who were talking about the Union.

Sturgill also testified that within a week of this conversation, Miller began taking him to lunch at a restaurant near the jobsite. Sturgill testified that for three consecutive days, Miller treated him to lunch. On two occasions, Stewart accompanied them. Sturgill recalled that

during these lunch conversations, Miller and Stewart asked him what he had heard about the Union and whether the Union representatives had been back at the jobsite.

Michael Smith worked for the Employer from June 2002 until approximately June 2004. In September 2003, Smith was working on the Employer's Peron Woods jobsite in Springfield, Ohio. He recalled that during this time period, Tim Stewart and Gerald Miller came to the job site. They asked how the job was going and if Smith was getting everything that he needed. During the conversation, Miller asked Smith if he had heard anything about the Union or if anyone had spoken with him about the Union. Smith responded that he had heard a few guys talking. He said that there had only been a little talk here and there, but nothing worthwhile.

Eric Crawford worked for the Employer from November 2003 until he quit on or about February 27, 2004. Prior to working for the Employer, he was employed by Mechanical Systems of Dayton or MDS, a non-union mechanical contracting company. On or about October 15, Crawford heard that the Employer was looking for welders. Having worked with Tim Stewart previously at MDS, he telephoned Stewart about employment. Stewart set up a meeting for Crawford with Gerald Miller and Stewart at Frisch's restaurant in Dayton, Ohio. During Crawford's meeting with Stewart and Miller, Stewart explained that the Employer was in a hiring freeze because of the Union. Miller added however, that there were ways around the freeze and asked Crawford how he felt about subcontracting. Crawford explained to them that he didn't want to subcontract because he needed insurance benefits for his family. During the conversation, Crawford explained the pay and benefits that he was seeking. Miller told Crawford that because of the hiring freeze, he would need to call his lawyer to see if he could hire Crawford any earlier. When Miller asked how he felt about the Union, Crawford told him that it didn't matter to him one way or the other. While Lance Miller testified that he interviewed Eric Crawford and asked Rodney Cremeans to administer the welding test to Crawford, Gerald Miller did not confirm or deny his alleged conversation with Crawford.

Gordon Jones worked for the Employer from March until November 3, 2003. During the time period from October 13 to 17, 2003, Jones was working at the Dayton Kitchen job site. As Jones was hooking up VAV boxes on the job, Miller visited the jobsite and spoke with him. Miller told Jones that he didn't know what his feelings were about the Union, however he wanted Jones to know that if he were being pressured about his vote, Miller wanted to know about it. Miller volunteered that if Jones wanted to talk with him, he should fee free to call him even at home. No one else was present during the conversation.

David McFadden testified that he had been working with his father at the Tri-Village jobsite during the early part of October 2003. Gerald Miler came to the jobsite and inquired as to how the job was going. McFadden testified that during the conversation, Miller asked McFadden and his father if they were voting for or against the Union. McFadden was not asked and did not testify as to how he and his father responded. McFadden also recalled that Miller asked how Sturgill was doing as a foreman. Miller mentioned that Sturgill openly supported the Union and Miller wanted to make certain that Sturgill was not spending too much time on the job talking about the Union. McFadden recalled that he and his father told Miller that there were no problems and that Sturgill was doing his job and everyone was working well together.

During the Employer's case in chief, Miller denied that he ever told any employee that

he would subcontract the plumbing and pipefitting work if the Union were elected. He also denied that he told any employees that there was a hiring freeze because of the Union activity. Miller denied that he told any employees the identity of any other employees who signed union authorization cards or who supported the Union. Miller did not address the alleged interrogation in his blanket denials.

2. Factual Conclusions Concerning Miller's Pre-Election Conduct

The overall evidence demonstrates that prior to the October 31, 2003 election, Gerald Miller engaged in conduct in violation of Section 8(a)(1) of the Act. With respect to the incidents of alleged interrogation of employees, Miller, for the most part, did not deny the testimony presented in support of the allegations. While he recalled a discussion with Jerry Fegel about the Union in September 2003, he asserted that Fegel initiated the conversation concerning the Union. He maintained that Fegel had, in fact, asked him questions about what was going on with the Union activity. Additionally, while he recalled a discussion with Don Sturgill about the Union, he also asserted that Sturgill initiated the conversation. Miller did not deny the alleged interrogation to either Fegel or Sturgill.

I credit the testimony of employees Fegel, McFadden, Sturgill, Addis, Flick, Smith, and Crawford in finding that Gerald Miller engaged in the conduct alleged in complaint paragraphs 6(a), (b), (d) (e, subsection i), (f, subsection i), (i)(j), (k) and (m). I found the testimony of these individuals to be credible and without exaggeration. Finding no credible rebuttal by Miller, I find that the Employer has engaged in the conduct as alleged in the above complaint paragraphs. With respect to whether this conduct is violative of the Act, my conclusions are discussed in a later section of this decision. I do not however, find that there is sufficient evidence to support the allegation of interrogation that is contained in complaint paragraph 6(g). While Flick testified that Miller asked him to identify the employees who supported the Union on the Tri-Village project, the testimony does not describe the conversation with sufficient specificity to evaluate the coercive nature of the statement.

In response to questions by the Employer's counsel, Miller gave blanket denials with respect to the allegations that he threatened to subcontract or close down the plumbing and pipefitting operation. He also denied that he told any employees that the Employer had a hiring freeze because of the union activity or that he told employees that he knew the identify of employees who had signed union authorization cards. I found Addis, Flick, Sturgill, and McFadden to be credible with respect to the incidents alleged in complaint paragraph 6(c), (e) subsection ii), (f) subsection (ii) and (h). Despite Miller's blanket denials, I find that on or about the dates alleged, Miller told employees that the Employer was not hiring because of the employees' union activities and threatened that the Employer would shut down the plumbing operation if the employees selected the union as their bargaining representative. Additionally, I find that Miller told an employee the identity of other employees who were engaged in union activity.

I do not, however, find sufficient evidence in support of complaint paragraph 6(l). While Miller asked Jones to let him know if he were being pressured, he prefaced the request by stating that he didn't know Jones' feelings about the Union. Jones gave no indication that Miller inquired or made the statement in such a way that Jones was compelled to disclose his feelings about the Union. Additionally, there was no indication that Miller specifically asked Jones to disclose the identity of any employees who spoke with him about the Union. Based

upon Jones' testimony, Miller simply asked Jones to let him know if he were being pressured during the course of the election campaign. Based upon total conversation as reflected in the record, I do not find Miller's statement to constitute a request to disclose the identity of Union supporters.

3. Alleged 8(a)(1) Incidents Involving Tim Stewart

Jerry Fegel signed a union authorization card on September 5, 2003. The next workday he wore a union ball cap and union tee shirt. Fegel continued to wear the cap and shirt every day for the remainder of the time that he worked for the Employer. Approximately a week after Fegel signed the union authorization card, he worked on the Employer's Virginia Stevens job site. During Tim Stewart's site visit, Fegel discussed his feelings about the Union with Stewart. No one else was present during the conversation. Fegel recalled that during the conversation, Stewart mentioned that Gerald Miller would "hold up negotiations for as long as he could" and that he "would do everything he could to prevent the Union from taking over." Fegel also testified that he spoke with Stewart about the Union while he worked on several different job sites. On one occasion, he recalled that Stewart told him that none of the bonuses would be paid because "they were going to have to utilize all their money and resources to combat the Union." Fegel recalled working at the Brentwood job site shortly before the election. He recalled one day when he and Stewart were talking on the job site and they again discussed the Union. In describing his conversation with Stewart he recalled: "Well, on this particular occasion he had said that Gerald would close the shop and sub out all the plumbing work if that's what it come down to."

During early September 2003, Martin Chambers worked at the Horace Mann jobsite in Springfield, Ohio. Chambers recalled that Stewart visited the jobsite and distributed some pamphlets concerning the Union. Chambers recalled that he also asked employees how they felt about the Union. Chambers identified employees Kyle Slade and Barry McCormick as also present at the time. While McCormick and Slade testified, they did not corroborate Stewart's alleged interrogation as Chambers describes.

Aaron Flick testified concerning a conversation with Stewart at the Beverly Gardens jobsite at the end of September 2003. Flick asked Stewart when he would get his 90-day review. Stewart told him that at that time, the Employer was not giving any reviews. In explanation, Stewart told him "Money's tired up with lawyers right now" and also added that the Employer was not giving reviews "until the union thing got worked out." During Stewart's same visit to the jobsite, he also spoke with Flick and his foreman, Darrin Sweargin. Flick testified that Stewart asked both he and Sweargin what they thought about the Union. Flick testified that both he and Sweargin responded that they were against it. Sweargin confirmed that he had a conversation with Stewart at the Beverly Gardens jobsite in early September. He did not corroborate Flick's presence during the conversation. Sweargin recalled that his conversation with Stewart occurred without anyone else present and as he and Stewart were walking across the job site. He recalled that Stewart inquired how the "union negotiations" were going. Sweargin testified that he repeated to Stewart: "And they were telling us how great it would be when we got in the union and what would happen and this and that. And I told him at the time it was just talks and nothing to be worried about and changed the subject because I was uncomfortable talking about it with him because of my job."

After working on the Peron Woods jobsite, Michael Smith was transferred to the

Virginia Stevens jobsite toward the end of September 2003. Smith recalled that during late September, Tim Stewart came to the jobsite and spoke with him. Initially, Stewart asked about how the job was going. During the conversation however, Stewart asked how Smith how he felt about the Union. Smith responded that he didn't really know that much about the Union. He added however, that he understood that there were better benefits with the Union. He told Stewart that he wanted to go to a scheduled meeting to see what the Union had to offer. Stewart told him "you can't blame anybody for trying to better themselves."

Sammy Johnson worked for the Employer from approximately September 15, 2003, until the first of March 2004. On or about September 25 or 26, Stewart visited the Virginia Stevens jobsite where Johnson was working. During his visit, Stewart asked Johnson his opinion of the Union. Johnson told Stewart that he didn't know, however, he planned to attend a few meetings and make a decision. Johnson then changed the subject and continued to work.

In October 2003, Jay Comer worked for the Employer as a plumber/operator on the Brentwood school jobsite. Comer testified that Stewart visited the jobsite while he was operating the backhoe. Stewart climbed into the cab with Comer and proceeded to ask Comer how he thought the "union vote would go." Comer told him that he thought that it would be a landslide in favor of the Union. Stewart agreed. Stewart also asked Comer how he thought that other people on the jobsite were planning to vote. Comer recalled that Stewart specifically asked about employees Rick Walsong, Jerry Fegel, and Darryl Battner. Comer testified that he told Stewart that he didn't know how Walsong and Battner were planning to vote. He pointed out that Stewart should know how Fegel was going to vote because he wore union shirts. Stewart testified that he didn't remember any conversation with Comer in the cab of the backhoe.

Mike Knupp worked for the Employer from the end of January 2002 until November 5, 2003. In mid-October 2003, Knupp worked at the Employer's Horace Mann jobsite in Springfield, Ohio. Knupp recalled that Stewart visited the jobsite and distributed some literature. Later in the day, Stewart invited him to lunch. During their lunch together, Knupp asked Stewart what he thought about the Union. Stewart replied that he didn't think it was going to be good for the company. Knupp testified that Stewart also asked him what he thought about the Union. Knupp told him that it would be good for a guy his age because of the training and pay. After lunch Stewart drove Knupp back to the jobsite. Knupp recalled that as he was leaving Stewart's truck, he jokingly stated: "I guess there isn't going to be any raises until this is over?" Knupp recalled that Stewart replied: "Yeah, you're probably right."

4. Stewart's Testimony

Stewart confirmed that usually the Employer gives employee reviews annually upon the anniversary of the employee's hire date, however, employees' reviews were postponed during the period prior to the election. Stewart explained that the Employer was concerned that any type of raise might be a bribe for votes. Stewart denied that he ever told employees that the Employer would shut down or subcontract out its plumbing operations if the Union were voted in. Stewart denied that he ever asked any employees about their support for the Union. He recalled that he spoke with employees about the Union, but only responded to their questions to him.

5. Factual Conclusions Concerning Stewart's Pre-Election Conduct

Stewart did not deny that he told employees that reviews were postponed during the election campaign period and affirmed that the Employer specifically suspended the reviews during this time period. While he denied that he interrogated employees or threatened that the Employer would close the plumbing operation if the employees selected the Union as their bargaining representative, he did not expressly address or deny individual conversations. Overall, I found the testimony of Fegel,[7] Sweargin, Smith, Johnson, Crawford, Comer, Knupp, and Flick to be credible with respect to their conversations with Stewart. In contrast to Stewart, their description of the alleged conversations were sufficiently complete and detailed enough to lend credibility to their recall. I do not, however, credit Flick's testimony with respect to complaint paragraph 8 (d, subsection i) as his recollection of the conversation was uncorroborated by Sweargin. Additionally, I do not credit Martin Chambers' testimony with respect to complaint paragraph 8(a) as his recollection was uncorroborated by McCormick and Slade. With respect to the other 8(a)(1) allegations linked to Stewart, I find merit to complaint paragraphs 8 (b), (c), (d, subsection ii), (e), (f), (g), (i), (j).[8]

6. 8(a)(1) Allegations Involving Lance Miller's Meetings With Employees

The Employer does not dispute that Lance Miller conducted meetings with employees concerning the Union during the period preceding the election. General Counsel presented seven witnesses to testify concerning these meetings. To a significant extent, these employees recalled particular statements made by Miller only in response to specific prompting by Counsel for the General Counsel. Martin Chambers recalled that 70 to 80 employees were present for a mandatory meeting on September 24. Lance Miller told employees that until the Employer could get better and bigger jobs; there would not be bonuses. Chambers recalled that he told employees that there be no reviews until after the "Union business is done with." Chambers maintained that Miller told employees: "Somebody might have signed some union cards, but that's not going to protect you, because whether we go union or not, some people might not be working for G Mechanical." Chambers recalled that during a meeting on October 8, Miller told employees that the company hoped to implement an apprenticeship program and improve the 401(K) program. Miller also described the negotiation process and what happens when parties reach an impasse. Chambers testified that Miller mentioned a bonus plan but did not explain how this was mentioned in relation to the Union.

Sweargin testified that he attended a mandatory employee meeting in the Employer's lunchroom in early September in which 25 to 40 employees were in attendance. He recalled that Miller told the employees that there would be no more reviews until after the first of the year "due to union negotiations." Miller explained that the Employer did not want to give any

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[7] While I credit Fegel's description of the events alleged in complaint paragraph 8 (c) subsection (i), I do not find Stewart's statement to constitute a violation of Section 8(a)(1). The basis for this finding is discussed in the legal analysis for the alleged 8(a)(1) conduct.

[8] Counsel for the General Counsel confirmed at trial that 8(h) described the same incident alleged in 8(j). Accordingly, there is no additional violation found for the conduct alleged in complaint paragraph 8(h).

raises or good reviews as it might be considered to be a bribe to other employees. Sweargin also testified that while Miller mentioned that union cards were signed at the last union meeting, he did not indicate how he knew they were signed. Sweargin recalled that Miller told the employees that the Union didn't want the employees; the Union wanted the company and the work. Miller added that employees "might not even have a future with the company if the union got in."

Darren McCormick worked for the Employer from May 2002 until November 2003. He testified that Lance Miller conducted weekly meeting with employees throughout the summer of 2003. He recalled that in one of the meetings Miller told employees that he was aware that many of them had signed union cards. McCormick recalled that Miller told employees that even though they had signed cards and if the union were voted in, that did not mean that they would be working at GM. He also recalled Miller's telling employees that the reviews would be delayed until after the election.

Kyle Slade worked for the Employer from October 27, 1997 until December 1, 2003. Slade attended an employee meeting on October 8, 2003. He estimated that Lance Miller conducted the meeting and approximately 60 employees attended. Slade recalled that during the meeting, Lance Miller stated that he knew how many Union cards had been signed and it did not matter how they voted. Slade also testified that he attended an employee meeting some time around September 24. He recalled that Lance Miller told employees that union negotiations were a two-way street and a contract is not mandatory. Slade recalled that Miller told employees that it is possible to even get a lower wage with a union. Miller also added that if the Union were voted in, he did not see how the company could continue to stay in business. Slade also testified that Miller talked about incentive programs and bonuses and other things to better the company if the union did not win the election. Miller also mentioned that there was a suggestion box in the office and he told employees that he was going to restart the company newsletter.

Chambers testified that approximately 70 to 80 employees attended an October 8 meeting conducted by Lance Miller. Chambers recalled that Gerald Miller, Steve Storck, and Tim Stewart were also present. During the meeting, Miller discussed the good and bad points of the Union. Miller told the employees that the Employer would try to get a better 401K program as well as an apprenticeship program. Chambers testified that Miller also discussed a bonus plan that awarded points for good attendance, bringing a job in on time, keeping man-hours low, and keeping material and equipment costs low. Chambers did not explain how this bonus system was discussed in relation to the Union or to the upcoming election.

Barry McCormick recalled attending 6 to 8 mandatory meetings in which all employees were in attendance. While he testified concerning a meeting in October, he did not identify the specific date of the meeting. He testified that during the meeting, Lance Miller told employees that he knew how many Union cards had been signed and who had signed them. McCormick asserted that Miller told employees that their reviews were suspended to the first of the year because of the legal issues involving the Union. Upon prompting, he also recalled that Miller stated that even if the Union were voted in, other Union members could replace employees. With additional prompting on direct, McCormick also recalled that Miller told employees that if the company remained a merit shop, it would "take off like a space shuttle." Don Sturgill also recalled the use of the projector in one of the

meetings and the demonstration of the space shuttle. Sturgill recalled Miller's stating that the rocket illustrated how the Employer was going to grow as compared to how the Union would just fall and explode.

Sweargin recalled that he attended an employee meeting in early October. After very specific prompting on direct examination, Sweargin recalled Miller's using an overhead projector to show a space shuttle taking flight. Telling employees that the company was theirs, Miller mentioned the improvement of the 401k program and the implementation of an apprenticeship program if the "union didn't get in."

Gordon Jones worked for the Employer from March 2003 until November 3, 2003. He recalled attending approximately four or five employee meetings prior to the election. He estimated that 50 to 60 employees usually attended the meetings. Jones acknowledged that he really didn't pay any attention in any of the meetings and he could not recall with any certainty what was said in the meetings. Jones the added:

> But I can tell you that I heard comments that the Union was insecurity at one point, and that the Union wanted the vote that the guys that were on list that the Union was going to work and that we at GM would be laid off.

Sammy Johnson could not recall the dates when he attended the meetings conducted by Miller. He testified that during one of the meetings, Miller told employees that even if employees signed the union authorization roster, they were not guaranteed a job with the Union. Miller referenced an apprenticeship program but explained that nothing could happen with the program until after the Union election. Johnson also recalled that during one of the meetings, Miller told employees that even if the Employer "went union," their jobs were not secure.

Jerry Fegel testified that he attended approximately six employee meetings prior to the election. While he did not identify the specific dates of these meetings, he recalled that Miller spoke with employees about what he was going to do if the "Union thing" was gone and how he would improve the company. Miller asked employees what he had done wrong "to cause all of this to happen." Sturgill recalled that Miller told the employees that if the Union "came in," the Union would eventually replace them with others and they would be "on the bench." Miller talk about implementing an apprenticeship program once the Union issue was resolved.

Don Sturgill estimated that the Employer held employee meetings every week between the end of September until the time of the election. Sturgill recalled that during the meetings, Lance Miller discussed the pros and cons of a merit shop and a union shop. Miller told employees that the best thing they could receive from the Union was training. Sturgill also testified: "Also he stated to us that we was no longer going to have any evaluations or any bonuses due to the fact that they were having to spend so much money in defending themselves because of the Union activity." Sturgill also recalled that in one of the meetings, Miller told employees that some of the biggest companies were merit shops and that the Union shops were going by the wayside. Miller told employees that they would benefit as non-Union because they would not be laid off and would be able to work closer to home.

Aaron Flick testified concerning a meeting with Lance Miller at the Tipp City High

School jobsite on the day before the election. Flick recalled that employees Dennis Barber, Brett Copeland, and Mike Knupp were present. Flick testified that during the meeting Lance Miller explained why the Union was not for the Employer. Flick recalled Miller's stating that if they left to go to the Union, they would be laid off all the time. During the meeting, Flick asked when he would have his 90-day review. Miller told him that he would try to get something scheduled the week after the union election. While Knupp was called as a witness for General Counsel, he did not corroborate Flick's testimony concerning the meeting at the Tipp City High School jobsite. Knupp testified that he attended approximately four or five meetings with Miller at the Employer's shop. Knupp recalled that Miller spoke about the Union and about the Employer's business. Miller told employees that the Employer had more employees than they ever had before and that business was on the upside.

Gerald Miller confirmed that prior to the election, the Employer conducted a union-avoidance campaign that included group meetings with employees. Lance Miller conducted all the meetings. When asked if Lance Miller stressed to employees in the meetings that "a lot of union members are sitting on the bench because there's no work for them," Gerald Miller testified: "I think that's pretty common knowledge, yeah."

Lance Miller recalled that he gave five speeches to employees prior to the union election. He denied that he ever talked about postponing employee reviews during the meetings. He explained that the Employer gives reviews quarterly and everyone with an anniversary date in the same quarter receives their reviews at the same time. Miller recalls that after his speeches, employees approached him and asked about when they would receive their reviews. Miller told employees that the reviews were postponed because he did not have time to do the reviews. Miller did not deny that some reviews were postponed. He explained, however, that reviews were eventually given and raises were awarded to those employees whose reviews merited a raise.

The Employer's counsel asked Lance Miller if he ever knew the names of the employees who signed Union authorization cards. He responded: "Not for certain no." He recalled that every week, he received a fax from the Union with names of employees who were in "some sort of group." Miller denied that he ever told employees that he knew who had signed union authorization cards. Miller denied telling employees that either their 401(k) plan or their apprenticeship program would improve if the Union lost the election.

Miller testified that he had not told employees that they would lose their jobs and be replaced by Union members if the Union won the election. He confirmed, however, that he explained to employees his understanding of the Union's referral procedure. Miller told employees that it was his understanding that if an employee had a brother, cousin, or relative in the Union, the employee was "pretty much guaranteed" work. If the employee did not have such an "inside scoop," chances are the employee would be out of work. Miller testified that he compared the Employer's track record in relation to the Union's track record for laying off employees.

7. Factual Conclusions Concerning Lance Miller's Meetings with Employees

Admittedly, Miller gave five speeches to employees prior to the election. The Employer presented no evidence to show that Miller's speeches were recorded or that he followed a scripted outline. Accordingly, there is nothing to corroborate Miller's denials.

While Gerald Miller confirmed that he might have been involved in the first meeting, he did not confirm or deny his presence at the other meetings and he did not corroborate Lance Miller's denials concerning this meetings. Although Stewart testified, he did not address Lance Miller's meetings with employees. Despite repeated prompting by Counsel for the General Counsel, I found General Counsel's witnesses to be generally credible with respect to the allegations involving Miller's meetings with employees.

While Lance Miller denies telling employees during the speeches that their reviews were delayed, he acknowledges that he told employees after the meeting that their reviews would be delayed because he did not have time to do them. Admittedly, some of the reviews were in fact delayed as predicted. Sweargin and Darren McCormick recalled that Lance Miller told employees that the reviews would be delayed until after the election or after the first of the year. Flick recalled that Lance Miller told him during a meeting at the Tipp City High School project that he would try to schedule his review the week after the election. While Flick testified that Mike Knupp was present during this meeting, Knupp did not corroborate or confirm Miller's statement about the review. Sturgill testified that Miller told employees during a meeting that the Employer was no longer going to give evaluations or bonuses because the Employer had to spend so much money defending itself because of the union activity. Sturgill is the only employee who recalled such a statement. I do not find his testimony credible with respect to this alleged statement and his testimony in support of complaint paragraph 7(a). Based upon the credited testimony of Sweargin and Darren McCormick, as well as the fact that reviews were delayed, there is sufficient evidence that during the meetings or immediately thereafter, Miller told employees that their customary reviews would be delayed and linked this delay to the Union's organizational activities. Accordingly, I find merit to complaint paragraph 7(a). I do not find that there is sufficient evidence to support complaint paragraph 7(g).

Complaint Paragraph 7(b) alleges that Lance Miller also told employees that the Employer knew the total number and names of employees that signed union authorization cards thereby creating the impression of surveillance among employees that their union activities were under surveillance by the Employer. Miller denied that he told employees that he knew who signed union cards. He acknowledged, however, that prior to the election he received information from the Union that included the names of employees who supported the Union. Sweargin recalled that Miller mentioned that he knew that union cards had been signed at the union meeting prior to his meeting with employees. Darren McCormick recalled Miller's saying that he knew that many of them had signed union cards. Slade testified that Miller told the employees that he knew how many cards had been signed and it did not matter how they voted. Barry McCormick testified that Miller told employees that he knew how many cards had been signed and who had signed them.

Based upon all of the testimony concerning Lance Miller's statements concerning employees' signing union cards, it appears that he referred to employees' signing union cards. Based upon his testimony and the testimony of the employees, it is likely that his statements were in reference to the continued correspondence that he received from the Union, continually notifying him of new employees who had throw their support to the Union. Despite Miller's testimony that he received this information from the Union, neither the Union nor General Counsel presented witnesses or documentation to rebut this assertion. Thus, it is likely that Miller's statements to employees during the meetings were more of an acknowledgement that he knew that employees were signing cards and openly supporting

the Union. Additionally, Miller would have been aware that a requisite number of employees signed union authorization cards in order for the Union to petition for an election. Consequently, I have no doubt that Miller referenced union cards because of information that he received from the Union's correspondence or from his knowledge of the Board's election process. Knowing why he made the statements however, does not detract from the potential interference or coercion created by such statements. Without more than Miller's bare denial and with no other testimonial, written, or recorded corroboration, the overall evidence supports a finding that Miller's statements were of such a nature that they conveyed to employees that their union activity was under surveillance and merit is found to complaint paragraph 7(b).

Paragraph 7(c) of the complaint alleges that Lance Miller promised employees that the Employer would improve their 401(K) plan benefits and training programs if the Union lost the election. Chambers recalled that in one of the meetings, Miller told employees that the Employer hoped to implement an apprenticeship program and improve the 401(K) program. Chambers recalled that during another meeting, Miller discussed a bonus plan that awarded points for good attendance, bringing in a job on time, keeping man-hours low, and keeping material and equipment costs low. He did not however, testify as to how this bonus system was discussed in relation to the Union or to the upcoming election. While Slade recalled only that Miller talked about incentive programs and bonuses[9] and "other things to better the company" if the Union did not win the election, he provided no specifics or details. Fegel testified that Miller talked with employees about what he was going to do if the "Union thing" was gone and how he would improve the company. He did not, however, give any details or identify any alleged improvements.

Miller testified that at the time of the union election, there was a 401(K) plan for employees and that employees were involved in an apprenticeship program. He denied that he told employees that the 401(K) plan or that the training program would be improved if the Union lost the election. Based upon the overall testimony presented, I do not find sufficient evidence to support the allegation that Miller told employees that the Employer would improve the 401(K) plan or improve the training program. General Counsel's witnesses provided only a bare assertion that mirrored the complaint language but did not provide sufficient detail to support the complaint allegation. Accordingly, I do not find merit to complaint paragraph 7(c).

Complaint paragraph 7(d) alleges that Lance Miller implied to employees that they would lose their jobs and be replaced by union members if the Union won the election. Miller denies that he told employees that they would lose their jobs and be replaced by Union members if the Union won the election. He acknowledged, however, that he explained to employees his understanding of how the Union referral system works for members. He does not deny that he stated that employees who had an inside track with the Union were guaranteed work while other employees would be out of work. Based upon the testimony of both Miller and Counsel for the General Counsel's witnesses, it is apparent that Miller discussed work availability through the Employer as compared to work availability through the Union's referral procedures. It is apparent that Miller attempted to explain that if the

[9] Lance Miller testified that there had been a bonus program for the field superintendent, project manager, and foremen from the mid-1990's until 2000 or 2001.

Employer were in a bargaining relationship with the Union, the Employer would hire employees through the Union's referral procedure. While Miller may have tried to convey the precarious nature of the Union's referral procedures, his statements nevertheless communicated to employees that their job security would be affected if the Employer recognized the Union as their bargaining representative. Accordingly, I find merit complaint paragraph 7(d).

8. 8(a)(1) Allegations Involving Lance Miller's Individual Conversations With Employees

As discussed above, Eric Crawford interviewed with Gerald Miller and Tim Stewart in October 2003. The next day after their meeting, Gerald Miller telephoned Crawford and asked him to come to the Employer's facility in Covington, Ohio to meet with Lance Miller and to see the weld shop. Crawford recalled that when he arrived at the facility on October 16, he noticed a sign taped to the front door informing applicants that the Employer was not hiring or taking applications at that time. After telling the receptionist that he was there to meet with Lance Miller, she handed him an application to complete. After completing the application, Crawford met with Miller. Miller asked about his experience and showed him around the weld shop. During the course of their conversation, Miller asked Crawford how he felt about the Union. Crawford not only replied that it didn't matter to him, he also asked Miller how he felt about the Union. Miller jokingly replied: "It's going to be the end of me yet."

Kyle Slade testified concerning a conversation with Lance Miller on or about October 1, 2003 at the Horace Mann jobsite. During the conversation, Miller asked Slade what he could have done to have prevented the election. Slade told him that one of the things that he could have done was to have had a Plumbing Field Supervisor. Miller agreed and said that he had been trying to find someone for a long time. During the same conversation, Miller explained that there would be no reviews or raises until the "Union thing is over with."

Michael Smith ran the Virginia Steven job in October 2003. He testified that during that time he requested a band saw for the job. Each tool request form for the saw was returned to him with no response. Smith initially discussed his problem with the band saw with Stewart. At one of Lance Miller's meetings, Smith also showed the form to Miller. He told Miller that he had requested the tool for three to four weeks with no success. Miller said that he would take care of the problem. Smith recalled that the night before the election, Miller called him and told him that he had a present for Smith in the back of his truck. The following morning and before he voted in the election, Smith discovered a new band saw in the back of Miller's truck.

9. Factual Conclusions Concerning Lance Miller's Individual Conversations With Employees

Lance Miller does not deny that Mike Smith received a new band saw. He explained that during the week prior to the election, Smith borrowed Dan Sweargin's band saw. Miller recalled that he received a telephone call from Sweargin who was upset that Smith was borrowing his saw. Miller explained that he tries to correct a problem such as this when he becomes aware of it. That same day, he purchased a new saw for Smith to use. I found Crawford's testimony to be credible with respect to his pre-employment conversation with Miller and I note that Miller did not admit nor deny his conversation with Crawford. While

Miller did not address the alleged conversation with Slade about the postponement of his review, Miller acknowledged that he told employees that their reviews would be delayed. Accordingly, I find that the evidence supports the allegations contained in complaint paragraphs 7(e) and (f). While there is no dispute that Smith received a band saw on the day of the election, there is no evidence that Miller or any other management representative linked the Smith's receipt of the band to his vote in the election. Accordingly, I do not find merit in complaint paragraph 7(h).

10. 8(a)(1) Allegations Involving Brian Crail

Martin Chambers testified that prior to a mandatory employee meeting on October 8, he met Brian Crail as he walked through the corridor that leads from the shop to the conference room. Chambers recalled that Crail told him: "The way this stuff's going, we ought to close down the plumbing and piping side of the shop and that'll get the Union out of here and we can go back to normal." Chambers testified that employees Barry McCormick and Don Sturgill were within arm's reach of he and Crail during this conversation.

Don Sturgill testified that he and Crail had worked together for different employers and had a good working relationship. He recalled that sometime between mid–September and the first of October, Crail visited his home. During the visit, Crail told Sturgill that he needed to start watching his back. Crail mentioned that Stewart described Sturgill as a traitor. Crail repeated Stewart's statement that if the Union won the election, Crail could be "out of a job." Stewart had allegedly admonished Crail for being Sturgill's friend. Stewart mentioned that the Union was becoming a "pain in the flesh" and he also mentioned the Union representatives' recent visit to the company to file applications for employment. Stewart had allegedly told Crail that after the representatives left, the applications were thrown into the trash. Crail repeated Stewart's statement that if the Union won the election, Gerald Miller would close the plumbing end of the shop and the employees would be out of a job.

11. Factual Conclusions Concerning Allegations Attributed to Brian Crail

While the Employer initially denied Crail's supervisory status, the Employer amended it answer at trial to admit that Crail was a supervisor and an agent of the Employer. Crail did not testify and thus did not rebut the testimony given by Chambers and Sturgill. I found Sturgill's and Chambers' testimony to be straightforward and sufficiently complete in detail to demonstrate credibility. Based upon the uncontradicted and credible testimony of Chambers and Sturgill, I find that the evidence supports a finding that Crail engaged in the conduct described in complaint paragraphs 9(a) and 9(b). As discussed below, I find that Crail's threat to Chambers that the Employer should close the plumbing and piping operation was clearly coercive and violative of the Act. The remaining allegations that are attributed to Crail occurred during a social setting and away from the Employer's facility. The comments were a part of a conversation during Crail's visit to Sturgill's home. In essence, Crail cautioned Sturgill to watch his back because Stewart referred to Sturgill as a traitor. During the same conversation, Crail opined that Miller would close the plumbing operation if the Union won the election and also told Sturgill that the Employer had thrown away the applications submitted by the Union members. I do not find that the social relationship between Sturgill and Crail to decrease or to remove the coerciveness of Crail's statements. Threats concerning possible antiunion retaliation by management are generally held to have a

tendency to coerce employees into declining to support a union, even when such threats are conveyed to employees by a friendly supervisor. *B. J. Titan Service Company*, 296 NLRB 668, 668 (1989). Accordingly, I find merit to complaint paragraphs 9(a) and (b).

12. 8(a)(1) Allegations Involving Rodney Cremeans

Nick Chambers worked for the Employer in pipe fabrication from November 2000 until November 2003. Although he didn't work with him, Chambers knew Mark Eaton. Chambers testified that prior to the election, Rodney Cremeans told him that Mark Eaton was laid off because he had been seen talking to a union representative. Chambers testified that Cremeans had not said anything else in this conversation.

The Employer denies the supervisory status of Cremeans and his ballot in the October 31, 2003 election was challenged by the Union on the basis of his alleged supervisory status. While Cremeans testified, he did not deny or address the alleged conversations with Chambers as alleged in complaint paragraphs 9(a)(b) and 10(a). As discussed more fully in the later part of this decision, the evidence reflects that Cremeans was a supervisor within the meaning of Section 2(11) at the time of these alleged conversations. Based upon the overall record, I credit the unrebutted testimony of Chambers and find that the incident occurred as alleged. Cremeans statement to Chambers implied a threat that other employees would be terminated if they were seen talking with a Union representative. Accordingly, I find merit to complaint paragraph 10(a).

13. 8(a)(1) Allegation Involving Mark Dinlinger

Charles Coffey has worked for the Employer for approximately five years and for the past two years he has been a foreman. Coffey recalled that he had been the foreman on the Employer's Dayton Central Kitchen jobsite in late August 2003. Mark Dinlinger was the project manager for the Dayton Central Kitchen job. The Employer admits that as Senior Project Manager, Dinlinger has been a supervisor and an agent of the Employer within the meaning of the Act.

Coffey recalled that on an occasion when only he and Mark Eaton were working on the jobsite, a union representative visited the jobsite. The union representative introduced himself and told Eaton and Coffey that the Union was trying to get the Employer to join the Union. Coffey testified that after the union representative's visit to the jobsite and prior to Eaton's termination, he spoke with Dinlinger by telephone. Coffey testified that Dinlinger asked if the union representatives had been on their job. When Coffey confirmed that a union representative had been to the job, Dinlinger asked the representative's name. Coffey told Dinlinger that he did not know. A few days later, Eaton was terminated.

Counsel for the General Counsel did not initially allege this conversation as violative of the Act. During the course of the hearing and after Coffey's' testimony, Counsel for the General Counsel moved to amend the complaint to include Coffey's conversation with Dinlinger as an additional 8(a)(1) allegation.[10]

[10] General Counsel's motion was granted and the complaint was amended to include this conversation as 10(b).

Counsel for the General Counsel argues that Coffey's testimony against the Employer should be credited because he continues to work for the Employer. Dinlinger did not testify and thus did not rebut Coffey's testimony. I find no basis to discredit Coffey's unrebutted testimony and find that the conduct occurred as alleged in Complaint paragraph 10(b).

14. Legal Analysis and Conclusions Concerning Multiple 8(a)(1) Statements Made to Employees Prior to the Election

a. Alleged Interrogation

As discussed above, the record evidence supports a finding that the Employer's agents engaged in sixteen incidents prior to the election in which employees were interrogated about their own union sympathies or the union sympathies of other employees. The applicable test for determining whether the questioning of an employee constitutes unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), *affd. sub nom*. *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In analyzing alleged interrogations under the *Rossmore House* test, the Board has considered what has come to be known as the "*Bourne* factors" that were first established in *Bourne v. NLRB*, 332 F.2d 47, 48 (2nd Cir. 1964). Those factors are:

(1) The background, i.e. is there a history of employer hostility and discrimination.
(2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against an employee?
(3) The identity of the questioner, i.e., how high was he in the company hierarchy?
(4) Place and method of the interrogation, e.g., was the employee called from work to the boss's office? Was there an atmosphere of unnatural formality?
(5) Truthfulness of the reply.

As the D.C. Circuit Court of Appeals noted in a 1998 decision,[11] the test for determining whether employee questioning is unlawful does not require a strict evaluation of each of the Bourne factors. The Court found that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the totality of the circumstances.

The interrogation in this case was conducted by Gerald Miller, who owns the company as well as by his son, Lance Miller. The interrogation was also conducted by Field Superintendent Tim Stewart and by Project Manager Mark Dinlinger. The questioning occurred not only by telephone but also in personal conversations away from the jobsites as well as on the jobsites. While none of the employees testified that the questioner threatened that they would take action based upon what they learned from the interrogation, the interrogations were targeted at finding out the identity of employees who already supported the union and those who were pre-disposed to supporting the Union's organizational campaign. Because it was apparent that the Employer was seeking to defuse the campaign,

[11] *Perdue Farms Inc., v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998).

employees could likely conclude that the Employer would take action based upon the information derived from the questioning. With respect to the Employer's background, the Employer was previously found to have violated the Act by terminating employees for Union activity. See *GM Mechanical, Inc*., 326 NLRB 35 (1998).

Based upon the totality of the circumstances, I find that the Employer's questioning by Gerald Miller, Lance Miller, Tim Stewart, Brian Crail, and Mark Dinlinger tended to restrain, coerce, or interfere with rights guaranteed by the Act. Accordingly, I find that the Employer has engaged in violations of 8(a)(1)[12] as alleged in Complaint paragraphs 6 (a), (b), (d), (e, subsection i), (f, subsection i), (i), (j), (k), (m), 7(f), 8(b), (c, subsection ii), (d, subsection ii), (e), (l), and 10(b). *Hancock*, 337 NLRB 1223, 1223 (2002); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985); *Gardner Engineering*, 313 NLRB 755 (1994), enfd. in relevant part 115 F.3d 636 (9th Cir. 1997).

b. Telling Employees that There was a Hiring Freeze Because of the Union

The complaint alleges that both Gerald Miller and Tim Stewart told employees that the Employer was not hiring or had a hiring freeze because of the Union. The Board has found that an Employer violates Section 8(a)(3) of the Act when it discriminatorily refuses to consider for hire and refuses to hire employee applicants because of their union affiliation. See *CC Group*, *Inc.,* 341 NLRB No. 15, slip op. at 1 (2004); *FES*, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3rd Cir. 2002). Accordingly, an employer restrains, coerces, and interferes the rights guaranteed by Section 7 of the Act by telling employees that it is not hiring because of the Union's organizational activity and I find merit to complaint paragraphs 6(c), (h) as well as 8(g).

c. Threats to Close the Facility or to Close the Plumbing Operation

Based upon the above, I have found that Gerald Miller, Tim Stewart, and Brian Crail threatened employees that the Employer would close its plumbing operations or its facility if the Union were selected as their bargaining representative. In its landmark decision in *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969), the Supreme Court established certain standards for determining whether an employer's statements about the effects of unionization are permissible. The Court stated that any evaluation of the employer's statements "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." The Court also stated that an employer is free only to tell "what he reasonably believes will be the likely economic consequences of unionization that are outside his control" and not "threats of economic reprisal to be taken solely on his own volition." Id at 619. I find that the threats made in the instant case to be threats of an economic reprisal for the employees' support of the Union. Accordingly, I find the Employer has violated Section 8(a)(1) as alleged in complaint paragraphs 6(e, subsection ii), 9(a, subsection ii), (b), and 8(f).

[12] While alleged to have occurred after the election, I also find that Miler's interrogation of employees alleged in complaint paragraph sections 6(n) and (o) is also violative of the Act.

d. Creating the Impression of Surveillance

When Gerald Miller spoke with Sturgill early in the Union's campaign, he asked Sturgill if he knew what employees were talking with the Union. While he specifically mentioned Martin Chambers, Jerry Fegel and Barry McCormick during the conversation, he did not explain whether he identified these individuals as having contact with the Union. The Board has long held that mere knowledge of employees' union activity is not sufficient to establish that an employer created the impression of surveillance. To establish a violation, it must be shown that this knowledge could only have come from surveillance. *South Shore Hospital*, 229 NLRB 363 (1977). Accordingly, I do not find that Miller's statement to Sturgill constituted a violation by creating the impression of surveillance. Thus, I find no merit to complaint paragraph 6 (f, subsection i). I find these circumstances, however, to be distinguishable from those involving statements made by Lance Miller during his meetings with employees, in which he talked about his knowledge of employees signing union cards. As indicated above, it is likely that Lance Miller's statements were based upon the fact that a petition had been filed or based upon information that he received directly from the Union about the progress of its organizing. Sweargin recalled that Miller told employees in one of the meetings that he knew that union cards had been signed at the union meeting prior to his meeting with employees. Barry McCormick recalled that Miller told the employees that he knew how many cards had been signed. These remarks could reasonably communicate to employees that this information could not be known without the Employer engaging in surveillance of their union activity. Therefore, I find merit to complaint paragraph 7(b).

e. Telling Employees That Their Reviews Were Cancelled Because of Their Union Organization Activity

As the Board noted in *Grouse Mountain Associates, Inc*., 333 NLRB No.157, slip op. at 2 (2001), an employer is required to proceed with an expected wage or benefit adjustment as if the Union were not on the scene. The only exception to this rule is when the employer makes it clear that the wage or benefit adjustment would occur whether or not they select a union, and that the "sole purpose" of the adjustment postponement is to avoid the appearance of influencing the election's outcome. In the instant case, there is no dispute that the regularly scheduled reviews were postponed until after the election. The Employer's newsletter also informed employees that the reviews were being delayed until after the election. Lance Miller told employees that the reviews would be delayed until after the election. He admits that he told employees that the reviews were delayed because he did not have time to do them. Admittedly, he did not tell them that the sole purpose of the delay was to avoid the appearance of influencing the election's outcome.[13] The overall testimony reflects that Lance Miller's statement to employees implied that the Union was to blame for their delay in getting their reviews. In doing so, the Employer violates Section 8(a)(1) of the Act. See *NLRB v. Otis Hospital*, 545 F.2d 252, 254-255 (1st Cir. 1976). Therefore, I find merit to Complaint paragraphs 7(a), (e), 8(c (i)), and (j).

[13] While Sweargin recalled that Miller mentioned that giving the reviews might be perceived as bribes, his testimony is rebutted by Miller who acknowledges that he told employees that the reviews were delayed because he did not have time to do them.

15. The Employer's Installation of a Suggestion Box

Complaint paragraph 11 alleges that about October 1, 2003, the Employer, solicited employee complaints and grievances by installing an employees' suggestion box, in order to discourage employees from engaging in activities in behalf of the Union. There is no dispute that the Employer set up an employee suggestion box at its facility in late September or early October. General Counsel argues that the Employer's October newsletter to employees advised employees of the upcoming election on October 31, 2003 and included a section that is entitled "Give Us Your Suggestions," contained the following announcement:

> We now have a suggestion box open outside our main office. We have also put up an E-mail address that you send your ideas to. It is suggestions@gmmec.com. Please help us make this the best place to work with your ideas!

Employees Nick Chambers, Knupp, and Slade testified that they first saw or heard about the suggestion box in late September or early October. Knupp and Slade recalled that Lance Miller mentioned the suggestion box at one of his meetings with employees prior to the election. Gerald Miller acknowledged that while there had been a suggestion box at an earlier time, there was not one at the facility between December 2001 and its reinstallation in either September or October 2003. Miller explained that the suggestion box was set up to give employees a chance to give either positive or negative suggestions about work-related or non-work related matters.

Admittedly, the suggestion box was not utilized for two years prior to its installation during the organizational campaign. It is well established that when an employer institutes a new practice of soliciting grievances during a union organizational campaign, "there is a compelling inference that he is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary." *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992), citing *Reliance Electric Co*., 191 NLRB 44, 46 (1971). Accordingly, I find merit to Complaint paragraph 11.

16. The issue of Whether Respondent Isolated Pro-Union Plumbers

Complaint paragraph 12 alleges that the Employer isolated its pro-union employees by assigning them to the Madd River Schools jobsite around the middle of October 2003. Jamie Chronabery testified concerning a conversation that he had with Tim Stewart and Lance Miller in early October. Prior to the conversation, he had heard Stewart and Miller talking about sending more plumbers to the Madd River project. Needing more plumbers on his own project, he asked Miller and Stewart why they were sending so many plumbers to one job when he needed plumbers. Stewart and Miller told him that they were just trying to isolate the plumbers to one location and to separate the "Yes" and "No" votes. The testimony of Chronabery is unrebutted and neither Stewart nor Lance Miller denied the statement attributed to them. Based upon the credible and unrebutted testimony of Chronabery, it is apparent that prior to the October 31, 2003 election, the Employer isolated pro-union employees in an attempt to interfere with their Section 7 rights. See *Masiongale Electric Mechanical*, 331 NLRB 534, 539 (2000). Accordingly, I find merit to Complaint paragraph 12.

C. 8(a)(3) Conduct Alleged to have Occurred Prior to the October 31, 2003, Election

1. The Employer's Discharge of Mark Eaton

Mark Eaton began working for the Employer on January 20, 2003. Prior to his employment with the Employer, Eaton submitted a resume and interviewed with Gerald Miller. The resume reflects that Eaton attended a Union apprenticeship and was a member of Plumbers and Pipefitters Local No. 97 from 1978 until 1984. The resume also lists Eaton as a UAW Journeymen Plumber-Pipefitter-Steamfitter for a job that began in 1999 and for a job that he held from 1992 until 1999. Eaton was hired at $16 an hour with the provision that his pay would increase to $17 an hour once he passed his welding certification. Eaton passed the certification and began at the $17 an hour rate. In April, Eaton's hourly rate increased to $18.

Eaton recalled that in approximately March 2003, he telephoned Dean Brill, the Business Manager for the Union. Eaton introduced himself and told Brill that he was interested in rejoining the Union. Brill explained that the Union had members on layoff at that time and it would not be fair to bring Eaton into the Union because the Union could not immediately refer him out for work. In June, Eaton again contacted Brill and asked about the possibility of rejoining the Union. Brill told him that members were still on layoff and it was not a good time for him to join the Union.

Eaton testified concerning a conversation that he had with Gerald Miller and Tim Stewart in June or July while he was working at the Peron Woods job site. Miller told Eaton that he heard that Eaton was unhappy and was considering leaving employment. Miller added that he had heard that Eaton was considering leaving to work for MSD or going to the Union. Eaton told Miller that he had run into a friend who had told him that MSD had a lot of work. He assured Miller that he had not however, contacted MSD. Eaton didn't comment on whether he had made any contact with the Union. Eaton testified that Miller asked what would it take for him not to quit. Eaton told Miller that one of his frustrations was the pre-fabrication piping. Eaton explained that a good deal of the piping for the current job was not "fitting" and that it was taking a long time for the pre-fabrication shop to make the corrections. Miller told Eaton that he understood his frustration, however, he was considering hiring a field superintendent with a plumber pipefitter background. Miller added that Eaton's name had been mentioned as a possibility. He went on to explain that Eaton had not been interviewed thus far because Eaton told Miller during his job interview that he needed some time to re-familiarize himself with plumbing. Miller also stated that the Employer had picked up a job with plumbing work and Miller would do his best to get Eaton on that job.

On August 29, 2003 only Eaton and Chuck Coffey worked at the Dayton Central Kitchen jobsite. At approximately 10:30 a.m., Union Representative Todd Lipinski visited the site. Lipinski told Coffey and Eaton that the Union was interested in organizing the Employer's employees. He told them about an upcoming meeting and asked them to call him. Coffey mentioned to Lipinski that Eaton had previously been a member of the Union. Eaton acknowledged that he had been a member and that he was interested in getting back with the Local and had even spoken with Dean Brill on a few occasions.

At approximately 2:30 that same afternoon, Gerald Miller and Tim Stewart visited the

jobsite. They first spoke with Coffey inside the building for approximately 10 minutes. Eaton saw Miller, Stewart, and Coffey leave the building and then re-enter the building 15 minutes later. Miller and Stewart then spoke with Eaton while Coffey worked at a table 10 to 15 feet away. Miller told Eaton that he was laid off because things "weren't working out." Miller also added that Eaton was slow on the last couple of jobs and specifically mentioned the Peron Woods job. While Eaton initially explained why there had been delays on the job, he also asked Miller to tell him the real reason that he was being laid off. Eaton testified that Miller asked: "What do you mean?" Eaton did not explain whether there was any follow-up to either his question or Miller's.

Jamie Chronabery worked for the Employer from July 1999 until January 2, 2004. From August 2002 until approximately two weeks before he quit in 2004, Chronabery was a project manager. Chronabery testified concerning a conversation that he had with Tim Stewart in early October and prior to the election. Chronabery recalled that he asked Stewart how the "union stuff got started." Stewart explained that the Union planted a salt. Stewart explained that a salt was someone that a union planted in the company to vote in the union. When Chronabery asked the identity of the salt, Stewart identified Mark Eaton.

Gerald Miller testified that Eaton was terminated because he ran the welder without oil. Miller asserted that he first learned of the damage to the welder on August 27, 2003 when he reviewed the invoice from the repair company. The Employer submitted into evidence a copy of an invoice dated August 22, 2003. The description of work is written in cursive and accompanied by the itemized costs. Printed at the bottom of the page are the words: "Engine was ran out of oil."[14] Miller recalled that he and Stewart went out to Eaton's work site on August 27 to talk with Eaton. When Miller arrived at the work site, he told foreman Chuck Coffey that he was there to terminate Eaton. Miller admitted that Coffey didn't agree with his decision and told Miller that Eaton was doing a good job. Miller denied knowing about any visit from a union representative at the time that he terminated Eaton. He asserted that when he confronted Eaton with the welder, Eaton admitted that he ran the engine for two weeks without checking the oil. Stewart testified that he accompanied Miller during Eaton's termination interview. He confirmed that Eaton was told that he was discharged because he did not check the oil in the welder and blowing up the welder.

Don Sturgill testified that he worked with Eaton in 2003 on the Peron Woods job. Sturgill recalled that Eaton was an excellent welder. Sturgill also told Tim Stewart that he was pleased to have Eaton on the job because he was a good welder. Sturgill also testified that as a foreman on the job, he was responsible for all of the equipment and he routinely checked the welder for the gas and oil level. He explained that it is not good for the welder to handle gas because of the danger of sparks igniting.

2. Conclusions Concerning Eaton's Discharge

The Employer asserts that Eaton was lawfully terminated because he showed gross negligence in the upkeep of a welding machine that he had been using. Counsel for the General Counsel submits that while Eaton engaged in little union activity, the Employer

[14] Miller asserted that Tim Stewart did not write those words and he assumed someone at the repair company wrote the statement.

suspected Eaton as being the Union "salt" and was aware that he was among the first employees visited by union representatives at jobsites. Because the Employer's motivation is a critical element in determining the lawfulness of Eaton's discharge, a *Wright Line* analysis must be used. In *Wright Line*, the Board set out the causation test that it would employ in all cases alleging violations of 8(a)(3) and the analysis is based upon the principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation. The analysis requires that General Counsel make an initial "showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. If the General Counsel makes that showing, the burden would then shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line, a Division of Wright Line, Inc*., 251 NLRB 1083, 1088 fn. 11 (1980).

In order to establish the initial burden under *Wright Line*, General Counsel must establish four elements by a preponderance of the evidence. General Counsel must first show that the employee engaged in protected activity and that the employer was aware that the employee engaged in protected activity. The General Counsel must also show that the employee suffered an adverse employment action and that there was a nexus or motivational link between the employee's protected activity and the adverse employment action. *American Gardens Management Company*, 338 NLRB No. 76, slip op. at 2 (2002).

The Employer asserts that it lacked knowledge of Eaton's union activity or sympathies, and it was justified in discharging Eaton because he damaged the welder machine by failing to check its oil level. The Board has recognized that direct evidence of an unlawful motivation is rarely available. The General Counsel may meet his burden through circumstantial evidence, such as timing and disparate treatment from which an unlawful motive may be inferred. See *Naomi Knitting Plant*, 328 NLRB 1279 (1999). In the instant case, Coffey's testimony demonstrates that the Employer already knew that a union representative visited the Dayton Central Kitchen jobsite before it terminated Eaton. Coffey testified, without contradiction, that prior to Eaton's termination, Project Manager Dinlinger phoned Coffey and asked if any union representatives had visited the jobsite. Inasmuch as Eaton and Coffey were the only employees assigned to that jobsite at the time, it is reasonable that the Employer may have suspected that Eaton supported the organizing drive when it abruptly terminated him on August 29.

Additionally, I note that the Employer already had notice of Eaton's previous union affiliation by virtue of his employment application. Knowing that the union representative was visiting Eaton's jobsite and knowing of his established past relationship with the Union, it is reasonable that the Employer identified Eaton as one of the employee's involved in promoting the Union's organizational activity. Additionally, the testimony of ex-project manager Jamie Chronabery discloses that the Employer suspected that Eaton was one of the primary supporters of the Union. Chronabery credibly testified that in early October, he asked Stewart how the Union started at the Employer's facility. Stewart responded that "the Union planted a salt" and he opined that Eaton was the "salt." While Stewart testified, he did not deny making the statement to Chronabery.

Accordingly, I find that Counsel for the General Counsel has met the burden of establishing that Eaton engaged in protected activity and that the Employer knew or suspected that he was involved in the union's organizational activity. As discussed above,

the Employer's agents and supervisors engaged in a plethora of conduct that interfered with employees' exercise of their Section 7 rights. Credited record testimony establishes the motivational link or nexus between Eaton's known or suspected union activity and his discharge. See *Farm Fresh*, *Inc.,* 301 NLRB 907, 908 (1991). Accordingly, General Counsel has established by a preponderance of the credited evidence that Eaton's union activity was a motivating factor in the employer's decision to terminate Eaton.

Because General Counsel has established a *prima facie* violation regarding Eaton's discharge, the burden shifts to the Employer to demonstrate that it would have terminated him even in the absence of his protected activity. *Manno Electric*, 321 NLRB 278, 280-281 (1996); *W.R. Case & Sons Cutlery Co*., 307 NLRB 1457, 1463 (1992). I do not find that the Employer has met this burden.

Miller testified that after he received the invoice for the repair of the welder on August 27, he decided to terminate Eaton. As Counsel for the General Counsel points out in his brief, the Employer's payroll records show that Eaton's last working day on the Southdale jobsite was on August 15. On cross-examination, Gerald Miller admitted however, that he first became aware that the welder was broken while Eaton was still working on the Southdale jobsite. He arranged for the welder to be repaired and he moved Eaton to another jobsite where he worked until his discharge on August 29. Miller also admitted that in a Board affidavit he stated: "A few days after the welder was sent to be repaired, I received a verbal report from the repair shop that the welder had run out of oil, and that the lack of oil had significantly damaged the welder's engine." Accordingly, the record reflects that even though the Employer contends that Eaton was terminated on August 29 because of his damage to the welder, the Employer had been aware of such damage since before August 15.

Additionally, the Employer's records do not establish that it has a practice of terminating employees for similar conduct. Gerald Miller acknowledged that he was unaware of any employees who were discharged for damaging company property during the three-year period prior to the end of 2003. He testified that sometime in the 1980's an employee named Mike Filtner was terminated because he did not check the antifreeze on a company truck and there was damage to the truck engine. Miller also testified that there might have been another employee whose first name was Chuck who was terminated after he put gasoline in a diesel tractor and after being told not to do so. Miller could not recall the date of this discharge, but confirmed that it would have been outside the three-year period. While the Employer presented no records to show that other employees were terminated for conduct similar to Eaton, the Employer's records indicate that employee Nate Burgh received a warning in May 2001 for damaging property while driving a forklift. He was suspended from driving the forklift for two months. Nick Chambers testified that Burgh punched two holes in the side of the Employer's facility while operating the forklift.

Thus, contrary to past practice, the Employer terminated Eaton without any prior discipline. Admittedly, the only other termination for an employee's negligently damaging equipment occurred in the 1980's. Miller's only other recall of an employee terminated for similar conduct was an employee who was insubordinate and who damaged equipment after failing to follow the Employer's directive. Overall, I do not find that the Employer has carried its burden of establishing that it would have terminated Eaton in the absence of his protected activity. See *La Gloria Oil and Gas Company*, 337 NLRB 1120, 1124 (2002); *American*

Cynamid Co., 301 NLRB 253, 254 (1991). I find that the Employer discharged Eaton in violation of Section 8(a)(3) and (1) as alleged in complaint paragraph 13(a).

3. Whether the Employer Denied Benefits to David McFadden, Jr.

General Counsel alleges that the Employer refused to convert David McFadden, Jr. to the same employment classification status as other employees, thereby denying McFadden health insurance and other benefits. McFadden was employed by the Employer from August 12, 2003 until March 2004. The Employer also employed him approximately four years prior to the 2003/2004 period of employment. When McFadden interviewed with Miller, he told Miller that he could not accept an hourly rate less than the $20 rate that he was currently receiving. Miller explained that he was not comfortable in paying McFadden the requested $20 rate. When Miller offered McFadden a three-week trial period without benefits McFadden accepted.

As discussed above, McFadden testified that during his initial interview, Miller asked if he were a member of the Union. McFadden testified that he confirmed for Miller that he was not a member of the Union. McFadden also testified that at the end of the three-week period, he telephoned Miller to ask when he would be able to be hired with benefits. Miller told him that he could not hire him at that time because of the union activity. McFadden also testified that during a telephone conversation two weeks later, Miller interrogated him about how he was going to vote in the election and about what other employees were saying about the union. McFadden testified that he had told Miller that he was undecided. He recalled that he had two additional conversations with Miller about his conversion to employment with benefits. In both instances, Miller explained that he could not do anything because of the union election.

McFadden acknowledged that he was hired as a full-time employee and worked 40 hours consistently throughout his employment. It was only toward the end of his employment that he worked less than 40 hours and this reduction resulted because he took off from work. McFadden admitted that at no time did he lead Miller to believe that he was a union member. McFadden also admitted that he finally stopped going to work and his leaving his employment was “pretty much a mutual thing.” He also acknowledged that the first time that he told Miller that he supported the Union was after he had difficulty in collecting his final check.

Miller recalled that after one of his foremen was incarcerated; he became more involved in the field operation. His employee, David McFadden, Sr., suggested that his son might be able to work for the Employer and relieve Miller in with staffing. When he spoke with David McFadden, Jr., McFadden requested to be paid in cash and did not want a full-time job. Miller asserts that McFadden was also working at another job where the work was a little slow. Miller recalled that McFadden also had some legal issues that precluded his wanting to go on the Employer’s payroll.

General Counsel asserts that the Employer did not hire McFadden because of a hiring freeze that the Employer imposed in response to the Union activity. General Counsel also submits that the Employer’s only reason for not converting McFadden to employment status was to avoid hiring union applicants. Firstly, the evidence reflects that while the Employer failed to hire applicants Kelly Brennan, Greg Bush, Scott Shouse, and Victor

Tanner after they applied for work on September 18, the Employer was hiring applicants prior to the election. It is this disparity in hiring upon which General Counsel relies in arguing that Brennan, Bush, Shouse, and Tanner were denied employment or consideration for employment.

Secondly, there is no evidence that the Employer had reason to believe that McFadden supported the Union. General Counsel's prima facie case cannot be established without demonstrating McFadden's protected activity, the Employer's knowledge of that activity, and animus toward that activity. See *Case & Sons Cutlery Co*., 307 NLRB 1457, 1463 (1992); *Associated Milk Producers*, 259 NLRB 1033, 1035 (1982). While the evidence may support that Miller engaged in unlawful interrogation of McFadden, there is no evidence that Miller had any reason to believe that McFadden supported the Union prior to his leaving the company. Admittedly, McFadden never told Miller of his support for the Union until he was trying to get his last check and after he separated from the company. Accordingly, finding that the record evidence does not support complaint paragraph 13(b), I recommend its dismissal.

4. The Employer's Discharge of Joshua Lee

Joshua Lee began working for the Employer as a plumber's helper on July 28, 2003. Lee was employed for only five weeks. Prior to being hired, he interviewed with Gerald Miller and also submitted a written application. During his interview, Lee told Miller that he had eight years experience in residential plumbing and also three years of commercial or industrial experience when he was in the Union from 1997 to 2000. Lee testified that Miller told him that the Employer was an open shop and Miller asked if this caused him any problems. Miller also asked Lee why he left the Union. Lee explained that he left the Union because he had wanted to go back to school and pursue a career in the medical field. After working for a time as a radiology technician, he decided to return to the plumbing trade. Lee's application reflects that he was employed in plumbing for two companies from August 2002 until the time of his application. Lee testified that both companies were non-Union. The application reflects that Lee has also served as a minister for a church in Dayton, Ohio since July 2002.

Lee worked on only two construction jobs during his employment with the Employer. The first job was at the Tri-Village School jobsite and the last job was at the Southdale Elementary jobsite where he worked for six days from Tuesday, September 2 to his September 9 termination. Doug Bloemker was Lee's foreman on the Southdale job. General Counsel submits that except for Lee's first day on September 2, Bloemker and Lee were the only employees that worked on the Southdale job.[15]

Lee testified that approximately four days after he began working on the Southdale job, Union Business Agent Tim O'Hearn visited the jobsite. Lee knew O'Hearn from his experience in playing on the Union's softball team. O'Hearn explained to him that the Union was trying to organize the Employer and asked Lee to identify the other people working on the job. Lee told him that the only other two guys on the job were his foreman Doug Bloemker and a subcontracting employee from another company. O'Hearn asked Lee to

[15] General Counsel Exhibits 9(a) and 9(b).

introduce him to Bloemker. When O'Hearn met with Bloemker, he explained that the Union hoped to organize the employees and also explained about the Union's benefits. O'Hearn gave Bloemker his business card and told him to call if he had any questions. After O'Hearn left, Lee told Bloemker that he thought that it would be great if the Union could organize the Employer. Bloemker disagreed, stating that he could not see working six months out of the year and having to sign a waiting list to work. Then Bloemker asked Lee why he brought the Union guys out there. Lee denied that he had done so.

Two days later, Bloemker told Lee that his "Union friend" had been back to the jobsite. Lee asked to whom he was referring. Bloemker explained that it was the guy that Lee previously brought to the jobsite. Again, Lee denied that he brought the Union representative to the site. Later that same day, Tim Stewart visited the jobsite. While Lee saw Stewart and Bloemker talking, he was not close enough to overhear their conversation. Lee recalled that as they spoke, they occasionally glanced toward him where he was working on a ladder. The next day Lee was again working on a ladder. At approximately 3:00 p.m., he saw Bloemker speaking with Gerald Miller and Tim Stewart. After they spoke for a while, Bloemker told Lee that Miller wanted to see him. Lee joined Miller and Stewart on the dock. Miller told Lee that the sinks that he installed on the Tri-Village job leaked and required repair. Lee told him that he had not installed those sinks. Miller then asked Lee why he had made such a large hole in the installation of a cooler on the Tri-Village job. Lee explained that he had used the "hole saw bit" in the installation of the cooler and had not used a hammer and chisel as Miller accused him of doing. Miller told Lee that he had no choice but to terminate his employment. Lee questioned how he could be accused of poor craftsmanship when two weeks previously Stewart complimented his work. Although Stewart was present, he said nothing to deny or corroborate Lee. While Lee continued to plead for reconsideration, Miller informed him that he was to pack up his tools and leave the jobsite.

Miller testified that Lee was terminated for poor workmanship. Miller asserted that approximately three weeks after Lee was assigned to his first job, foreman Don Sturgill telephoned him and told Miller to get Lee off the job. Miller asserted that Sturgill insisted that Miller fire Lee because Lee was "not intelligent" and was making all kinds of mistakes. Miller recalled that Sturgill told him that Lee put a hole in the side of a cooler using a ballpene hammer or sledge hammer instead of drilling a hole with a hole saw. Miller also recalled that employee Marvin Flick re-worked all of the drains and lavatory supply tubes because Lee did the work incorrectly. Miller testified that he fired Lee after only a few weeks of work because he felt that because of Lee's workmanship, the situation would only get worse. Miller denied any knowledge of Lee's union activity prior to his termination.

Stewart testified that Don Sturgill complained to him about Lee's work on the cooler and requested Lee's removal from his work site. Stewart also recalled that there had been another complaint about "some work" that Lee did on the trap underneath a kitchen sink. Stewart could not recall who made the complaint.

Don Sturgill testified that he was aware of the hole in the cooler system. Sturgill testified that he first saw the hole when he was making a "walk through" or inspection tour with Gerald Miller when Sturgill was taking over the Tri-Village job. Sturgill recalled that it had been David McFadden who initially pointed out the hole to him. McFadden also told Gerald Miller that Lee made the hole. Sturgill testified that he told Miller that he could not say who was responsible for the hole because both Mike Bailey and Josh Lee worked on the

kitchen installation on that job. Sturgill confirmed that the cooler did not need to be replaced and that it had taken approximately 15 to 20 minutes to repair the hole.

Sturgill testified that while he worked on the Tri-Village job in September 2003, he complained to Gerald Miller and to Tim Stewart about the work performed by Jason Bailey and Nick Herman. Despite Sturgill's complaints, Herman was not terminated and was moved to work with his father-in-law on another job. Sturgill testified that Herman was vocal against the Union and wore no union insignia during the campaign.

Lance Miller testified that during the sixteen months prior to December 19, 2003, the Employer terminated 13 employees for cause other than Eaton and Lee. Only five of those employees were terminated for poor work performance. Miller identified employees Thomas Bach, Elmore Hall, John Smith, Wendy Sullenberger, and Michelle Skogsberg as the employees terminated for poor work performance. Bach was terminated from the service department on August 30, 2002. The exit interview form completed by his supervisor at that time reflects that while he was terminated because of a "difference in philosophy," he would be rehired without reservation. Although Lance Miller included Hall as one of the employees who was terminated for cause, his personnel file reflects that he was laid off in February 2003. While Miller testified that the file incorrectly reflected a layoff, he also acknowledged that prior to Hall's separation, he was removed from coordination drawings because he continued to make too many mistakes in the CAD coordination drawings. Hall's personnel file also contains a disciplinary action form dated May 23, 2002. The disciplinary action form documents that this employee repeatedly demonstrated a lack of detail in his job duties that led to costly problems in the field. The form further documents: "There have been thousands of dollars lost at Ansonia coring holes that were not properly layed out on the coordination drawings. As the one doing the CAD drawings, it is his responsibility to let someone know if he cannot complete the task in a correct manner. Poor workmanship and lack of quality will not be tolerated in this position." Smith's file reflects that while he continued to have problems with John Burke, refused to listen, and "goofed off all the time," he was given the opportunity to leave the fab shop and work in the field. Smith declined and was terminated. Sullenberger worked as a dispatcher. Her personnel file reflects that she was laid off in August 2003. Skogsberg worked in CAD prior to her separation from the Employer on August 19, 2002. Her personnel file reflects that she was laid off. Miller testified that the personnel files for Skogsberg, Sullenberger, and Hall were incorrectly completed to document a layoff rather than termination.

Lance Miller testified that with 85 employees on the job, there are occasions when employees do not do a job incorrectly and the work must be redone. He explained that the usual procedure is that the employee who made the mistake will fix the mistake. He explained that the best way for an employee to learn from his mistake is to correct his own mistake if time permits. Lance Miller also confirmed that he doesn't automatically terminate an employee for his first mistake and he will give the employee a second chance.

5. Factual and Legal Conclusions Concerning Lee's Discharge

The record evidence reflects that Lee did very little in support of the Union. His only real activity was simply being at work when the Union representative visited the jobsite. Despite such minimal activity, the evidence supports a conclusion that he was terminated because of his actual or suspected union activity. Although Gerald Miller denies knowledge

that Lee talked with any union representatives, the Employer stipulated that sometime about September 4 and prior to Lee's termination on September 9, Miller learned that a union representative visited the Southdale jobsite and talked with employees there about the Union. The record reflects that Lee and Bloemker were the only employees that worked on that job during that time period. As evidenced by Lee's unrebutted testimony, Bloemker was unequivocal in his position against the Union. Because of Lee's employment application, the Employer was aware that Lee was previously a union member when he worked in his craft. Because of Lee's background, it would not have been difficult for Miller to determine which of the employees on the jobsite was receptive to the Union's visit.

The Employer asserts that it terminated Lee because of his poor workmanship and because he damaged the cooler by making the wrong-sized hole with a hammer. Lee denied that he did so. While Miller testified that Don Sturgill complained about Lee and requested his removal from the job, Sturgill did not corroborate Miller's testimony.

The overall evidence reflects that Lee's alleged poor workmanship was a pretext for terminating Lee because of his recent union activities. Sturgill credibly testified that he did not blame Lee for the hole in the cooler and that the hole was easily repaired without damage to the cooler. I note that the Employer did not offer any documentation to show that there was damage to the cooler.

Additionally, the record reflects that the Employer has tolerated similar conduct by other employees without discharge or even discipline. Martin Chambers testified that in about April 2001, he made a wrong-sized hole for a pipe and his supervisor only told him to fix the hole. Chambers also recalled that on another occasion, he showed Stewart a wrong-sized hole made by plumber Darrel Battner. Stewart jokingly responded and instructed Chambers to repair the hole.

Sturgill testified that when he was the foreman at Tri-Village School jobsite in about September 2003, he complained to both Stewart and Gerald Miller about Nick Herman's shoddy workmanship. Sturgill's unrebutted testimony was that Miller laughed and told Sturgill that he would have to continue to use Herman on the job because "that's all we've got for you right now." General Counsel also presented testimonial evidence to show that employees Marvin Hoblitt and David McFadden, Sr. damaged materials and equipment without apparent discipline.

As discussed above, Lance Miller issued Elmer Hall a written warning for lack of detail in his job duties that was noted to have costs the Employer "thousands of dollars." Because Hall continued to make too many mistakes in his CAD coordination drawings, he was demoted six months later.

In meeting his initial burden under *Wright Line*, the General Counsel may offer proof that the employer's reasons for an employee's discharge are false or pretextual*. Pro-Spec Painting, Inc.,* 339 NLRB No. 115, slip op. at 4 (2003*); National Steel and Shipbuilding Co*. 324 NLRB 1114, 1119, fn 11 (1997) and I find the General Counsel has done so. The total record evidence supports a finding that the Employer's explanation for Lee's discharge is pretextual. When an employer presents an otherwise legitimate basis for its actions and that reason is found to be pretextual, a fact finder may not only infer that there is some other motive, but that the real motive is one that the employer wishes to conceal. See *Laro*

Maintenance Corp v. NLRB, 56 F.3d 224, 229 (D.C. Cir. 1995); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Finding that the Employer's reason for discharging Lee was pretextual, I also find that the Employer has failed to meet its burden under the *Wright Line* analysis. *Sanderson Farms*, *Inc.*, 340 NLRB No. 59, slip op at 1 (2003). Accordingly, the Employer has failed to prove that it would have terminated Lee in the absence of his known or suspected union activities in violation of Section 8(a)(3) and (1) of the Act as alleged in complaint paragraph 13(c).

6. The Employer's Failure to Hire Kelly Brennan, Greg Bush, Scott Shouse, and Victor Tanner

There is no dispute that the Union sent Kelly Brennan, Greg Bush, Scott Shouse, and Victor Tanner to the Employer's facility on September 18, 2003 to apply for employment. Union representatives Todd Lipinski and Paul Long accompanied them to the Employer's facility. The applicants wore shirts and hats bearing the Union logo. The receptionist gave them applications and directed them to a room where they could complete the applications. Bush recalled that the receptionist's name was Hannah. When Shouse asked if he could have an employment interview, the receptionist told him that the person who normally interviews applicants was not in the office. The receptionist also explained that the applications are kept on file for 30 days and that applicants may be called. Shouse testified that before he left the Employer's office, a well-dressed man came into the office and looked over Shouse's application. Shouse could not recall if the man introduced himself. He only recalled that after looking over the application, the man stated that Shouse might receive a call. Victor Tanner left his resume with the receptionist and took his application with him to complete later. The resume reflects that Tanner received his training through the Union. Union Representative Lipinski later mailed Tanner's completed application.

Shouse, Tanner and Brennan all listed union contractors as prior employers. Bush included the Union as his most recent the employer. Each of the applicants listed union representatives as references. Shouse, Bush, and Tanner testified that in November 2003, they telephoned the Employer's facility and left messages inquiring about jobs. They received no response from the Employer. Brennan recalled that she telephoned the Employer's facility on November 10, 2003. She spoke with a young woman but did not know the woman's name. Brennan explained to the woman that she had filled out an application approximately a month before and inquired if the Employer was hiring. The young woman confirmed that the Employer was not accepting applications or hiring at that time. Shouse, Tanner, Brennan, and Bush all testified that the Employer's first response to their application was in August 2004.

Shouse has been a pipefitter and a member of the Union for 17 years. He has been a journeyman pipefitter for 12 years. He has held a City of Dayton plumbing license for four years and he also has a COC certification for recovering refrigerant. Gregory Bush has been a member of the Union for seven years. His application reflected that he has experience in welding, plumbing, and pipefitting. Victor Tanner's application reflected that he has been a journeyman pipefitter for approximately 18 years as well as a certified stick welder. Kelly Brennan has been a journeyman pipefitter since 1999.

Jamie Chronabery testified that in early October, he spoke with Tim Stewart about hiring more plumbers for his jobs. Stewart told him that the Employer could not hire any more plumbers until after the election.

As discussed above, Sturgill testified that on or about September 18, Pipe Fabrication Manager Brian Crail told him that some union members had recently submitted applications and that the Employer had thrown them in the trashcan. In the same conversation, Crail also told Sturgill that Gerald Miller was putting up a sign at the shop, announcing that applications were being accepted only for entry-level positions with 2 years experience or less. Crail went on to explain that Miller was doing so in order to avoid hiring union plumbers. Sturgill, Chronabery, and Crawford all testified that they saw this sign posted on the front of the Employer's office. The Employer did not deny that it posted this sign.

Lance Miller testified that the Employer was not advertising jobs in the fall of 2003. Gerald Miller testified that around the time of the election, he had no need to hire new employees. He explained that while he hired field supervisor Steve Storck in November 2003, he had earlier tried to hire Storck's father, Dick Storck, in July 2001. Miller recalled that he had expected Dick Storck to begin working for the Employer in the fall of 2002. Storck changed his mind however, and declined the job. Miller asserted that while Storck chose not to come to work for the Employer, he recommended five or six key people, including his son, for employment. Miller contended that when he met with Steve Storck in late 2003, Storck mentioned someone whose first name was Howard and whose brother's name was Jeff. Storck also mentioned Eric Crawford.

7. Conclusions with Respect to the Employer's Failure to Hire Brennan, Tanner, Shouse and Bush

In its 2000 decision in *FES (A Division of Thermo Power*), 331 NLRB 9, 12 (2000), the Board set out the analysis to be used in failure to hire or failure to consider to cases. Under the *FES* framework, General Counsel bears the initial burden to put forth a *prima facie* case. To do so, the General Counsel must demonstrate that the Employer was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct. General Counsel must also show that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination. Lastly, General Counsel must show that antiunion animus contributed to the decision not to hire the applicants. Once these criteria are established, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

The Employer argues that General Counsel has failed to meet his initial burden because he has failed to show that the Employer was hiring at the time the applicants attempted to apply for employment. The Employer asserts that during the 30 days following the September 18 applications, the Employer did no hiring whatsoever and did not hire any applicants until late February 2004. The Employer also argues that none of these applicants called to follow-up on their applications until November 2003 and after the 30-day period when submitted applications expire. Contrastly, General Counsel argues that the Employer was hiring during this time period as evidenced by the testimony of Eric Crawford. While working for a non-union contractor in October 2003, Crawford heard from another employee

that the Employer was hiring. Crawford testified that when he met with Stewart and Miller on October 15, Stewart explained that the Employer was in a hiring freeze because of the Union. Miller opined that "there were ways around that" and continued to interview him. During the course of the interview, Miller asked Crawford how he felt about the Union. Crawford told him that it didn't matter to him one way or the other. Miller told Crawford that he needed to call his lawyer about hiring Crawford because the Employer was in a "hiring freeze." On November 4, the Employer hired Crawford.

The Employer is correct in that the record does not reflect that it hired any employees during the 30-day period following the September 18 application attempt by the four Union members. Thus, while the Employer may have technically failed to hire any other employees during this period of time, the credible testimony of Eric Crawford reflects that but for the Union's organizational efforts, the Employer would have hired Crawford even earlier than November 4. Sturgill credibly testified without contradiction that Crail told him that the Employer had not only thrown away the September 18th applications, but had also posted a sign to exclude union plumbers as applicants. The evidence also reflects that all four of the applicants were journeymen plumbers and pipefitters and had the requisite experience and skills to perform the work.

Accordingly, Counsel for the General Counsel has met his burden under *FES* and has established a *prima facie* case that the Employer unlawfully failed to hire or to consider for hire Brennan, Bush, Shouse, and Tanner. The Employer's rebuttal burden is to demonstrate that, in the absence of an employee's union activity, the Employer would have refused to hire the applicants for a specific reason and not "merely that it would have done so or that it had a right to do so." See *Mid Mountain Foods, Inc*., 332 NLRB 251, 253 (2000); *Chugach Management Services, Inc*., 342 NLRB No. 69, slip op. at 3 (2004). Conversely, the Employer has not met its burden in showing that it would not have hired or considered these applicants in the absence of their Union affiliation. Consequently, I find that the Employer has violated Section 8(a)(3) and (1) of the Act by its failure to hire or to consider for hire the applicants as alleged in complaint paragraph 13(d).

8. The Opening of An Exercise Room at the Employer's Facility

General Counsel alleges that about October 1, 2003, the Employer opened an employees' exercise room and in doing so the Employer discriminated in regard to the hire or tenure or terms or conditions of employment in violation of Section 8(a)(3) of the Act. In his brief, Counsel for the General Counsel argues that the Employer's October newsletter to employees, which included anti-union propaganda and announced the upcoming election, contained the following caption: "Employee Exercise Room. Now Open! Call Lance if you are interested." Counsel for the General Counsel submits that the suspicious timing of the Employer's announcement compels a finding that the Employer opened the exercise room to discourage employees' union activities. I do not find General Counsel's argument to be persuasive. While the newsletter references the opening of the exercise room, there is no reference to the Union or to the election in the announcement of the exercise room. The newsletter also references employees' birthdays occurring in October, November, and December. Employees are also told that if they have a tool that needs repair, they should send it back to the shop and "Ab" would repair it for them. It might be just as easily argued that by mentioning the tools repair and the birthdays, the Employer engaged in conduct designed to gain favor with employees and to discourage union activity. I don't find the

opening of the exercise room to be any more coercive than the celebration of employee birthdays or the repair of their tools. Finding no merit to this allegation, I recommend the dismissal of complaint paragraph 13(e).

D. Allegations Concerning Conduct Occurring after the October 31, 2003, Election

1. 8(a)(1) Allegations Involving Gerald Miller

Bryan Rice worked for the Employer as a journeyman plumber from the latter part of February 2004 until he was discharged on October 28, 2004. Prior to working for the Employer, he had not previously worked for any Union contractors. As of January 2004, Rice had been employed by MDS in Dayton for approximately nine months. Based upon information that he received from MDS employee Jeff Storck,[16] Rice contacted Steve Storck at the Employer's facility to inquire about employment. Steve Storck told him that the Employer was hiring. Storck told him that he had a difficult time finding qualified people and he suggested that if interested, Rice should apply for employment. After completing an application on February 12, 2004, Rice met with Gerald Miller. Initially Miller asked Rice how long he had been in the plumbing trade and how he got along with his Employer at MDS. Rice recalled that Miller told him that he needed someone on the job who knew what was going on and who could get the job done. Miller added that the Union was trying to take over his company. Miller asked Rice if he had ever belonged to a labor union and how he felt about organized labor. Rice told Miller that everyone has a right to seek his or her own employment and to make a living. He told Miller that he didn't feel one way or the other about the Union. Miller told Rice that he would talk with Steve Storck and that Storck would give Rice a call. During the conversation, Miller indicated that he had also tried to recruit MDS employees Howard Whiner and Jeff Storck to come to work for him. Miller asked Rice if had heard anything from these guys and asked Rice to tell them to call him.

Approximately a week after meeting with Miller, Rice met with Steve Storck at the Employer's facility. Storck told Rice that he was scheduled for a pre-employment drug test. Storck also mentioned that he had discussions with his brother Jeff Storck as well as MDS employees Howard Whiner and Mike D'Amico about coming to work for the Employer. When Rice reported for his employment with the Employer on February 24, 2004, he met with Gerald Miller and Steve Storck. Storck told Rice that he was going to be assigned to work at the Virginia Stevens Elementary school jobsite and that Don Sturgill was running the job. During the conversation, Miller told Rice that if there was any Union activity going on or unscheduled meetings where someone was giving him ideas about the Union, he was to report it to Storck and Miller. Storck explained that Sturgill was running the job and had gone "to the dark side." Miller also added that Sturgill had become a thorn in their side.

I found Rice's testimony to be straightforward and overall to be credible. While Miller testified, he did not address the conversation as alleged by Rice. Storck was not called to testify. While Rice testified that he had been terminated, the record does not reflect the circumstances of his separation from the Employer. There was thus, no evidence that would establish that Rice's testimony was colored by bias or that he was seeking any retribution. Accordingly, I find no basis to discredit his uncontradicted testimony and I find that Miller

[16] The record reflects that Jeff Storck and Steve Storck are brothers.

engaged in the conduct alleged in complaint paragraphs 6(n) and (o). Further, I find that by engaging in the conduct alleged in complaint paragraphs 6(n) and (o), the Employer has violated Section 8(a)(1) of the Act.

E. 8(a)(3) Allegations Involving Conduct Occurring After the Election

1. The Employer's Reassignment of Jerry Fegel

General Counsel alleges that about November 5 to December 12, 2003, the Employer reassigned Jerry Fegel from pipefitting jobs in the field to more arduous and less agreeable job assignments at its Covington, Ohio shop. As noted above, Fegel worked for the Employer from November 2002 until he quit in March 2004. He was initially hired by Lance and Gerald Miller as a draftsman. He worked as a draftsman for his first six weeks of employment and reported to Roger Couch in the CAD department. In approximately May 2003, he was reassigned to the field and worked as a journeyman plumber. Fegel testified that within the first two weeks of working in the field, Gerald Miller and Tim Stewart mentioned several times their appreciation for the fine job that he and Darrin Sweargin were doing in their jobs.

After signing a union card on September 5, 2003, Fegel began wearing a Union shirt and ball cap to work. He testified that he wore the Union clothing to work almost every day until he quit in March 2004. Fegel recalled that a few weeks prior to the October 31 election, Lance Miller made a derogatory comment about his shirt. During the first or second week of October, Tim Stewart told Fegel that his Union hat was "the most extreme ugly hat" that he had ever seen.

On the day prior to the election, Fegel was working at the Brentwood Elementary School job site. Fegel telephoned the office and spoke with Lance Miller. Fegel asked Miller if he were going to get additional employees, materials, or equipment in order to meet the scheduled deadline for the job on which he was working. Miller told him that he was not going to receive any of those additions because Fegel was "laying down on the job and was milking it." Fegel attempted to explain to Miller that he wanted to do a good job and was concerned about the job. Fegel testified that Miller did not seem to want to listen to him and Miller told him that his father would come out to the job later to discuss the matter with him.

Later that same day, Tim Stewart came to the job site and spoke with Fegel. Fegel testified that Jay Comer and Rick Lawson, an electrician, were also present during the conversation. When Fegel told Stewart about his earlier conversation with Miller, he said that he didn't appreciate Miller's insinuations. Fegel asked Stewart if he were considered a foreman or a lead man. Stewart only answered that Fegel was the best man for the job.

The day after the election, Lance Miller called Fegel and told him that it was his lucky day because he was going to begin working in the shop. The next workday Fegel reported to the shop and met with Gerald Miller and Lance Miller. No one else was present. Lance Miller told Fegel that he had received reports that Fegel was "laying down on the job" and intentionally trying to destroy the company. Fegel asked for the identity of his accusers and attempted to respond to the remarks. Fegel recalled that Miller interjected that either Fegel was laying down on the job intentionally or he had to be the worst plumber that ever lived. Miller told Fegel that from that time on, Fegel would work in the shipping department under

the supervision of Russ Sparks and Dave Eshman. He was to do whatever tasks assigned, whether it was sweep the floors, load trucks, move equipment, or stock fittings. Gerald Miller also told Fegel that the office and the computer equipment were off limits to him. He was to take breaks with the other shop employees. During the time that Fegel worked in the shop, he saw field employees and pipe fabrication employees going into the office. Fegel explained that the shop area in which he worked was different than the pipe fabrication shop. Prior to this time, he had never been assigned to work in the shop. During the time that Fegel worked in the shop, he stocked fittings, pulled fittings, emptied a truck that was filled with material returned from a job site, swept floors, moved equipment and carried out trash. Fegel testified that there was no comparison in his work in the shop as compared to the work that he had performed in the field. He explained that the shop work was totally menial work compared to the skilled trade work that he normally performed.

Jamie Chronabery recalled that he saw Fegel working in the shop doing general cleanup, stocking, and work that was normally performed by a helper or apprentice. Chronabery also confirmed that he had never previously seen field plumbers working in that same shop area.

After approximately a month of working in the shop, Superintendent Steve Storck asked Fegel if he would like to work with Darrin Sweargin at the Beverly Gardens School jobsite and Fegel was returned to work in the field.

The record reflects that Fegel was active in the organizing campaign and openly demonstrated his support for the Union. Sturgill testified that as early as late August, Gerald Miller identified Fegel as one of the primary Union supporters. Thus, knowledge of Fegel's protected activity has been established. While Fegel was required to work in the shop for only a month, his duties there were unlike those previously performed. Both Sturgill and Chronabery testified that field plumbers had not been assigned to work in the shop prior to the election. The employer does not dispute Fegel's testimony that he performed menial tasks involving sweeping the floors, stocking fittings, unloading trucks, and taking out the trash. Thus, it appears that Fegel suffered an adverse employment action.

The Employer did not provide any specific explanation for Fegel's transfer to the shop. The overall record demonstrates that General Counsel has established a prima facie case that Fegel was transferred to the shop because of his activities in support of the Union. The Employer has not offered any evidence to show that Fegel would have been assigned these duties in the absence of his union activity. Accordingly, I find merit to complaint paragraph 13(f).

2. Martin Chambers' Reassignment

Martin Chambers worked for the Employer from September 2000 until March 2004 as a plumber and pipefitter. In March 2001, Chambers worked at the Middletown Christian School jobsite. While working there, Union Business Agent Dean Brill visited Chambers at the jobsite. Approximately a year later, Union Business Agent Brill and another Union representative visited the Tri-Village jobsite where Chambers worked as foreman. While Chambers talked with the Union representatives, Lance Miller and Tim Stewart passed by within proximity of 10 feet and observed the conversation. Chambers testified that he believed that after this experience, his job reviews deteriorated. Chambers also recalled that

Stewart told him that because the job wasn't "coming in on time," a new foreman was taking over his duties and Chambers was then moved to a lead man position. On cross-examination, Chambers acknowledged that he stated in an affidavit to the Board that he had problems with the Employer since he began in 2000 and before he spoke with the Union representatives. At the end of September 2003, Chambers signed a card to join the union.

Jamie Chronabery testified that in early December 2003, he spoke with Tim Stewart about assigning Martin Chambers to the Lagonda School jobsite. Chronabery wanted Chambers on the site to install some radiant panels because he had previous experience in doing this work. At Chronabery's request, Stewart asked: "You sure you want to do that, with all this union stuff going on?" When Chronabery explained that he wanted Chambers because he had done this same work correctly on the Lincoln jobsite, Stewart denied his request.

In December 2003, Chambers was working on the Virginia Stevens School jobsite. On approximately December 8th, he was called into the shop to meet with Lance Miller and Tim Stewart. Miller and Stewart told Chambers that he was reassigned to work in the shop because of tension in the field and Chambers' problems in working with others.[17] Miller told him that the foreman on the Virginia Stevens job reported that Chambers had a bad attitude that was "reflecting" on the people with whom he worked. Miller went on to add: "These blue skies are going to be opening up for you guys." He also told Chambers that he had heard that the Union was going to pull him out at the end of the year. Chambers denied knowing what Miller was talking about. Stewart told him that while he worked in the shop, he would remodel the bathroom and the "rec" room. Stewart also told him that he would clean out the garage area where Gerald Miller stored his car. When Chambers asked Miller why he was assigned to do such menial tasks when the field was screaming for additional manpower, Miller told him that everybody that works there had to this work every once in a while. Chambers recalled that it took approximately three to four days to clean Miller's garage.

Chronabery testified that he observed Chambers working in the shop area and doing general cleanup and stocking duties. After approximately three weeks, Steve Storck reassigned Chambers to work on the Beverly Gardens jobsite where he remained until he resigned in March 2004.

The evidence reveals that Chambers was identified as a supporter of the Union's organizing efforts. Fegel's testimony reflected that in late August or early September, Gerald Miller asked if he "knew that Martin Chambers and Barry McCormick had been speaking with some members of the Union." Sturgill recalled that during a conversation with Gerald Miller in late August, Miller identified Chambers as one of the three employees that was assisting the union organizing. In early December and right before his assignment to the shop, Stewart denied Chronabery's request to send Chambers to work on the Lagonda School jobsite, referencing the current union activity.

Admittedly, Chambers had problems with the Employer from the beginning of his employment in 2000 and even before he spoke with any union representative. Additionally,

[17] Chambers acknowledged that he had previously been called into the office in October 2003 to receive a reprimand.

the record does not reflect that Chambers did anything to openly demonstrate his support for the Union. Based upon the total record evidence, however, it appears that he was perceived to be involved in the Union's organizational activity. I found the testimony of Fegel, Sturgill, and Chronabery to be fully credible with respect to the above-described conversations. The Employer gave no basis for Chambers' transfer to the shop. When Chambers inquired why he was reassigned to the shop, Miller only told him that everyone working at the facility had to do this kind of work every once in a while. The record however, reflects only Fegel and Chambers were given these kinds of extended assignments away from their normal work in the field.

The total record evidence supports a finding that Chambers was assigned to work in the shop in December 2003 because of his support or perceived support for the Union. The Employer has not demonstrated that Chambers would have received this assignment in the absence of his Union activity. Therefore, I find merit to complaint paragraph 13(g).

3. The Employer's Failure to Hire Certain Applicants in February 2004

General Counsel alleges that the Employer refused to hire and refused to consider for hire Anthony DeBrosse, Matt Seibert, Walter Lipinski, and Mike O'Hearn. On January 9, 2004 Anthony DeBrosse and Matt Seibert went to the Employer's offices and spoke with the receptionist. Seibert was wearing a union shirt and union hat and DeBrosse was wearing a union hat. Seibert told her that he understood that the Employer was hiring and they were there to file an application. She told them to wait and she would check. She left the room and could be heard talking with someone in another office. She returned to the room and reported that the Employer was not hiring. Seibert and DeBrosse asked if they could leave their names, telephone numbers, and resumes. She told them "No."

In early February, Union Business Agent Todd Lipinski faxed a copy of Seibert's resume and an accompanying cover letter to the Employer. There is no dispute that the Employer received Lipinski's fax. DeBrosse testified that approximately two weeks after he visited the Employer's office on January 9, he e-mailed his resume to the Employer. The Employer stipulated that the e-mail was received on February 6, 2004. DeBrosse recalled that approximately a week to two weeks after the e-mail, he received a telephone message from Lance Miller, informing him that the Employer did not accept resumes by e-mail. Seibert began working on another job on February 9, 2004. He recalled that around the first of March, he received a telephone call from a man who identified himself as being with the Employer. The individual told him that the Employer did not accept resumes by fax. The man also asked if he were currently working and Seibert confirmed that he was. The man asked if he expected a future layoff and Seibert explained that he was. The individual then told him that when he received his layoff from his current job, he should make an appointment to come into the shop and file out an application. When Seibert was laid off around the first of April, he telephoned the Employer's office and spoke with an unidentified woman in the office. He told her about his earlier conversation in March and confirmed that he was laid off and was calling as suggested. She informed him that the Employer was not hiring. When he asked to leave his name and number for future contact, she declined to take the information.

Lance Miller testified that after receiving DeBrosse's resume by e-mail, he telephoned DeBrosse and left a message on his answering machine. In the message, Miller explained

that the Employer did not accept resumes by e-mail. Miller denied that he ever heard anything further from DeBrosse. Miller also recalled that he received a resume by e-mail from Seibert. Miller testified that he later spoke with Seibert and asked him to come in for an interview. Seibert declined because he was working elsewhere. Miller denied that he told Seibert to come in to apply when his current job was finished. In approximately September 2004, Seibert and DeBrosse received a letter from the Employer offering them employment.

On January 30, 2004, Walter Lipinski and Mike O'Hearn visited the Employer's office in Covington, Ohio and both wore Union hats. At the time of their visit to the Employer's facility, neither Lipinski nor O'Hearn held any positions with the Union. Prior to that time however, Lipinski had served as business manager, financial secretary, and treasurer for the Union. O'Hearn had previously served as the Union's vice-president. When Lipinski and O'Hearn went into the Employer's office, they asked the receptionist for an application for employment. She told them that the Employer was not taking any applications at that time. They asked if they could leave their name and telephone numbers for future consideration and she explained that the Employer was not taking that kind of information.

On February 27, both Lipinski and O'Hearn returned to the Employer's office and again wore Union hats. At that time they spoke with a different receptionist and asked for applications. The receptionist gave them applications and they completed the applications in the Employer's office. Lipinski listed Union Business Manager Dean Brill as a reference and also completed the form showing that he had been Union Business Manager from 1987 until 2003. Lipinski listed his former employers that were also union companies. O'Hearn listed his references as Union Business Agents Tim O'Hearn and Todd Lipinski, as well as Union Business Manager Dean Brill. O'Hearn also listed union companies as his prior employers.

Approximately a week after their February 27th visit, Lance Miller called Lipinski to come in for an interview. At the end of the interview, he was also given a written aptitude test. Lipinski recalled that he was wearing his union hat at the time of the interview. During the interview, Lipinski explained that he had 35 years experience in the trade. He talked with Miller and another man who did not identify himself about his various experience in the trade. Miller told him that he was probably better suited as a project manager. Miller and the other interviewer also questioned why he wasn't retired. Lipinski later received a letter dated June 29, offering him employment that was to begin in July. Lipinski never replied to the offer.

Lance Miller testified that while he interviewed Lipinski when he applied for a job as a pipefitter, he did not hire Lipinski because his experience had been office work for the previous 10 to 15 years. Miller asserted that while he told Lipinski that he was better suited to an office position with the Employer, Lipinski had not been interested.

On March 3, Lance Miller telephoned O'Hearn and asked if he were still interested in working for the Employer. When O'Hearn told him that he was not working, Miller scheduled him to come in for an interview. O'Hearn went in for his interview on March 4. O'Hearn again wore his Union hat when he spoke with Miller. O'Hearn described his experience during the previous 20 years. In July 2004, O'Hearn learned that he had a certified letter from the Employer. He never claimed the letter. O'Hearn testified that he was employed at the time and never contacted the Employer to find out why they sent him a certified letter.

Lance Miller recalled that he also interviewed O'Hearn; but did not hire him. Miller

explained that there were a "couple of reasons" that he did hire not O'Hearn. Miller pointed out that O'Hearn had not had any plumbing experience for the last 17 to 20 years and his plumbing experience had been in heavy industrial plumbing. Miller testified that he had also been concerned about the number of layoffs in O'Hearn's work experience and the length of time for the layoffs.

At the time that the Union submitted Seibert's resume, Seibert had ten years of experience as a journeyman pipe fitter and welder. He had also completed a five-year apprenticeship program and was a certified welder. Former employers listed on Seibert's resume were union employers. DeBrosse's resume reflects that he had completed an apprenticeship with the Union and was a journeyman pipefitter. DeBrosse's former employers listed in the resume were union companies. Lipinski's application reflects that he had a five-year VAT-approved apprenticeship, a certification in welding, a prior plumbing license for the city of Dayton, a current license for Montgomery County, and a 30-hour OSHA card. O'Hearn's application reflected that he had served his apprenticeship through the Union and had worked through the Union for 34 years.

Gerald Miller testified that while the Employer did not need to hire employees near the time of the election, circumstances changed in February 2004. Miller recalled that approximately 16 employees left the Employer between the time of the election and February 2004 and Lance Miller began actively hiring new employees. Gerald Miller admitted that in January 2004, the Employer offered employment to Jeff Storck, Howard Weinart and Mike D'Amico and these individuals "turned down" the Employer's offer. Lance Miller testified that in February and March of 2004, several applicants were hired. Miller recalled that during this period, he hired Lynn Cleveland, James Simkins, Dwayne Clark, James Jackson, Joe Jackson, and Ryan Rice. Miller asserted that applications were also received from Brian Merrick, Ryan Bensman, John Sladewiski, Tim Callicote, and James Rhodes. Miller asserted that the Employer attempted to hire James and Joe Jackson a year or more before they were hired in 2004. He also testified that Lynn Cleveland was hired because he had worked for one of the Employer's subcontractors. Miller confirmed that Steve Storck hired James Simpkins and Brian Rice and that Rice had previously worked with Storck at MSD. Lance Miller testified that it was not unusual for the Employer to hire a group of employees who worked for another company. He maintained that the Employer had a similar hiring practice with the Service Department.

The Employer argues that there is no record evidence that the Employer was hiring or had concrete plans to hire on January 9, 2004 when DeBrosse and Seibert visited the Employer's facility. In his brief, Counsel for the Employer argues:

> The Union may contend that GM attempted to hire a few employees away from one of GM's competitions, MSD, in December 2003 or January 2004. GM asserts that the evidence does not show that it was "hiring" at the time.

The Employer argues that the MSD employees were a unique situation. In its brief, the Employer further asserts that in an attempt to recreate MSD's success in the plumbing field, the Employer attempted to hire a number of employees from MSD, including Brian Rice and Eric Crawford. The Employer maintains that the record will show that it was attempting to hire certain specific MSD employees, and no others. The Employer further argues that Seibert and DeBrosse did not have the specific qualifications necessary for the open

positions. The Employer argues:

> Specifically, in order to be considered for hire by GM in December 2003 or January 2004, the applicant at issue had to have one very unique, specific qualification – he or she had to be a current employee of MSD working in MSD's successful plumbing operations. It cannot be disputed that Seibert and DeBrosse did not have these qualifications. GM had no "opening" for plumbers "off the street" like Seibert and DeBrosse.

The Employer also asserts that it was not "hiring" when Lipinski and O'Hearn attempted to apply for employment on January 30. The Employer contends that it did not decide to start accepting applications until late-February, at which time it contacted both Seibert and DeBrosse to invite them to put in a valid application and it also provided applications to Lipinski and O'Hearn on February 27, 2004, when they revisited the Employer's facility to again apply for work.

The Employer's defense for its failure to hire or consider for hire DeBrosse, Seibert, Lipinski, and O-Hearn is not persuasive. While the Employer does not deny that it hired employees prior to the end of February 2004, the Employer argues that it was not "hiring" on January 9 and 30, 2004 and also applies a qualification for hiring that would specifically exclude eligibility for any of the Union applicants. By requiring that the applicants be employees of MSD, a non-union employer, the Employer effectively excluded the union applicants from any consideration for employment. In *Glenn's Trucking Co*., 332 NLRB No. 87 (2000), the employer claimed that the failure to hire was due to the applicants' inferior qualifications and that the applicants had been passed over in an "honest random selection process." Finding the employer's asserted business reason to be pretextual, the Board determined that the circumstances warranted an inference that the employer's true motive in failing to hire the applicants was an unlawful one.

In the instant case, I find that the Employer's justification for its failure to hire or to consider for hire these four applicants to be pretextual. I also find that on the basis of the record as a whole, the circumstances warrant the inference that the Employer's true motive is an unlawful one.[18] The overall evidence supports a finding that General Counsel has met his burden under *FES*[19] and has demonstrated that the applicants' union membership was a significant factor in the Employer's failure to hire these four individuals. Because the Employer's reasons for its failure to hire these individuals have been found to be pretextual, the Employer has not met its burden in proving that the Employer would not have hired these individuals in the absence of their union membership and affiliation.

I do note, however, that while the Employer may have initially failed to hire or consider hiring these four applicants, the Employer later offered employment to Lipinski in a letter dated June 29, 2004. O'Hearn acknowledged that in July 2004, he learned that he had been sent a certified letter. Because he was working somewhere else at the time, he never claimed the letter or contacted the Employer to determine the contents of the letter. Accordingly, it appears that the backpay obligation for O'Hearn and Lipinski may be tolled on

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[18] *Shattuck Denn Mining Corp*., 362 F.2d 466 (9th Cir. 1966).

[19] *FES (A Division of Thermo Power)*, 331 NLRB 9, 12 (2000).

or about the dates when employment was subsequently offered to them. The Employer asserts that it later contacted Seibert and DeBrosse around the first of March 2004 and informed them that while the Employer did not accept applications by fax or e-mail, they could come into the facility and file an application. The Employer asserts that neither Seibert nor DeBrosse chose to submit an application. Seibert testified that he received a telephone call from the Employer around the first of March 2004. When Seibert told the caller that he was currently working, the caller told him to come in to fill out an application when he was laid off from his current job. Seibert acknowledged that while he did not go in to fill out an application at that time, he later contacted the Employer's office at the first of April and was told that the Employer was not accepting applications. DeBrosse testified that he received the telephone call from the Employer telling him that the Employer could not accept applications by e-mail. He acknowledged that he did not thereafter go back to the facility to submit a written application. There is no evidence that the Employer had a practice of accepting applications by e-mail or by fax and a written application appears to be a requisite part of the application process. I do not find however, that the Employer's telephone calls to DeBrosse and Seibert in March 2004 effectively cured its unlawful failure to hire or to consider hiring these individuals. DeBrosse's failure to follow-up and to submit a written application may, however, toll his backpay and this may more appropriately be resolved through the Board's compliance process.

Based upon the total record evidence, I find that the Employer failed to hire or to consider to hire Seibert, DeBrosse, Lipinski, and O'Hearn in violation of Section 8(a)(3) and (1) of the Act.

III. Representation Case

Pursuant to a stipulated election agreement executed by the Employer and the Union, and approved by the Regional Director for Region 9 on October 2, 2003, an election was conducted on October 31, 2003. The appropriate unit set forth in the agreement is "All pipefitters, pipe welders, licensed plumbers, unlicensed plumbers, plumber helpers, and plumber apprentices employed by the Joint employers working at or out of their 4263 State Route 48, Covington, Ohio facility, but excluding all office clerical employees, professional employees, all other crafts, and all guards and supervisors as defined in the Act." As reflected in the Tally of Ballots, there were approximately 51 eligible voters. Of those voters, 15 votes were cast for the Union and 17 votes were cast against the Union. There were 19[20] challenged ballots and those challenges were sufficient to affect the outcome of the election. On November 5, 2003, the Union filed timely Objections to Election. Accordingly, on July 22, 2004, the Acting Regional Director for Region 9 issued a Report on Challenged Ballots And Objections To Election, Recommendations To The Board, Order Directing Hearing, Order Consolidating Cases, Order Transferring Cases To The Board And Notice of Hearing. In his Order, the Acting Regional Director ordered the issue of the challenged ballots and certain of the Union's objections be consolidated with the Union's unfair labor practice charges for a hearing before an administrative law judge. By virtue of the Order, the issues raised by

[20] The Union challenged the ballot of William Rauch during the October 31, 2003 election. Prior to the conclusion of the hearing, the Employer withdrew its position that Rauch was an eligible voter and the parties stipulated that Rauch was not included in the appropriate unit. Accordingly, the challenge is sustained.

those challenges and election objections are included in this decision.

A. Resolution of Determinative Challenged Ballots[21]

1. Supervisory Challenges

The Employer challenged the ballots of Don Sturgill, Kyle Slade, Jerry Fegel, and Darrin Swearingen on the basis of supervisory status. The Union challenged the ballot of Dennis Graber, Rodney Cremeans, and Doug Bloemker as supervisory employees. During the course of the hearing, the Employer withdrew its challenges to Kyle Slade, Jerry Fegel, and Darrin Swearingen. Additionally, during the course of the hearing, the Union withdrew its challenge to Doug Bloemker on the issue of supervisory status. The Union did not withdraw its challenge to Bloemker on the basis that he was a sheet metal worker and not a part of the appropriate bargaining unit. Accordingly, the ballots cast by Kyle Slade, Jerry Fegel, and Darrin Sweargin should be opened and counted.

a. Don Sturgill

Don Sturgill has been a plumber for 25 years and began working for the Employer in December 2001. He quit his employment in June 2004. Sturgill's job title was plumbing foreman when Gerald Miller hired him in 2001. Sturgill normally worked 40 hours a week with a daily schedule of 7 a.m. until 3:30 p.m. He was paid on an hourly basis. As foreman, Sturgill reported to Tim Stewart, Gerald Miller, and the project manager for the respective job. Sturgill testified, without contradiction, that he neither had the authority nor had he exercised independent judgment to hire, fire, transfer, suspend, layoff, recall, promote, discharge, assign employees to other jobs, reward, discipline, or to adjust grievances. As with other foremen, Sturgill used a company truck as well as a company cellular phone and gas credit card. By using the company phone, Sturgill was able to stay in constant contact with Miller, Stewart, and the project manager. As with other foremen, he maintained keys to the job trailer and to the job gang boxes. He did not however, have keys to the office or access to the office filing cabinets. He testified that as foreman, he normally had one to three employees assigned to his crew. He determined what work the crewmembers would do based upon their abilities and experience in the trade.

Sturgill testified that there were occasions when he was responsible for the plumbing on more than one job site. The Employer argues that at one time, Sturgill was responsible for the plumbing on three separate school construction sites. Sturgill testified, however, that Tim Stewart made the final decision when employees were moved from one site to another under Sturgill's responsibility. Sturgill also testified that approximately 85% to 90% of his working time was spent working with his tools. As foreman, Sturgill could not independently assign overtime. He testified that overtime was at the direction or authorization of Tim Stewart or other management personnel.

The individual employee working on Sturgill's job completed his or her own time

[21] The Union challenged the ballot for William Rauch, contending that he is an independent excavating contractor. During the course of the hearing, the Employer stipulated that Rauch was not an employee in the bargaining unit. Accordingly, the challenge to his ballot should be sustained.

sheet. Sturgill verified the hours and signed the time sheet. Sturgill testified that on those occasions that he disagreed with the employee as to the correct number of hours worked, he reported the conflict to Stewart and let Stewart "take it from there."

While Sturgill testified that while he has asked that individuals not be assigned to a particular job, there is no record evidence of what occurred when such requests were made. In its brief, the Employer asserts that Sturgill sold some equipment and tools to Gerald Miller. There is no dispute that prior to working for the Employer, Sturgill was self-employed and operated a company that did plumbing, heating and air conditioning. The fact that Miller agreed to pay the price that Sturgill requested does not demonstrate supervisory indicia.

Section 2(11) of the Act, 29 U.S.C. Section 152(11) defines a supervisor as an individual, in the interest of an employer, who has the authority to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline employees or to responsibly direct them or to adjust grievances or to effectively recommend such action. The authority cannot, however, be of a merely routine or clerical nature and must require the use of independent judgment. While the Employer asserts that Sturgill possessed supervisory authority, there is no evidence that this authority was communicated to Sturgill. The Board has declined to find individuals as supervisors based on alleged authority that they were never notified that they possessed and where its exercise was sporadic and infrequent. *Volair Contractors, Inc*., 341 NLRB No. 98, slip op. at 3 (2004); *Greenspan, D.D.S, P.C*., 318 NLRB 70, 76 (1995), enfd. 101 F.3d 107 (2d Cir. 1996).

Additionally, I find it interesting that while the Employer asserts that Sturgill was a supervisor, there were other foremen who voted without challenge. Charles Coffey testified that he has been the Employer's foreman for a "couple of years" and yet there is no evidence that his ballot was challenged. Based upon the entire record evidence, I find that as a foreman, Sturgill functioned more as a lead man than as a supervisor within the meaning of Section 2(11) of the Act. *John Cuneo of Oklahoma, Inc*., 238 NLRB 1438, 1439 (1978). An employee does not become a supervisor merely because he gives instructions or minor orders to other employees.[22] Additionally, an employee does not become a supervisor because he has greater skills and job responsibilities or more duties than his fellow employees. *Chicago Metallic Corporation*, 273 NLRB 1677, 1689 (1985). Accordingly, I find that the record evidence does not demonstrate that Sturgill was a supervisor within the meaning of the Act. I recommend that his ballot be opened and counted.

b. Dennis Garber

Dennis Garber began working for the Employer in February 1977. No other employees have more seniority than Garber. He received his first journeyman's lumbers license in the early 80's. Garber has a master plumber's license from Indiana. He testified that if he were to apply, he would be able to obtain an Ohio master plumber's license. During the previous ten years, Garber has primarily served as foreman on the jobs to which he has been assigned. Garber testified that for the most part, he is able to get the tools and the manpower that he needs for a job. and occasionally, he is able to get the jobs that he wants because of location and his skills. He could recall no instances when he has made special

[22] *NLRB v. Doctors' Hospital of Modesta, Inc*., 489 F.2d 772, 776 (9th Cir. 1973).

requests for particular job assignments. He has, however, occasionally voiced his desire to work with certain employees on particular jobs. Garber explained that he is usually able to get the tools that he needs on the job because he has a history of needing what he requests and the Employer is aware of that history. Garber also explained that over the 27 years of employment, he has a relationship of trust with the Employer. Based upon that relationship, the Employer is aware that when he voices a need for something, the need is genuine.

Garber testified that when he leaves an employee in charge in his absence, it is with the knowledge of the field supervisor. When he leaves one job site to go to another, it is at the request of the field superintendent or the project manager. Garber acknowledged that 80 percent of his time is spent in plumbing and piping and approximately one percent of his time is spent dealing with sheet metal. The remaining 20 percent of his time is devoted to coordinating fellow employees and keeping job assignments for his crew, ordering supplies and materials, and completing the requisite paperwork. The parties stipulated that Garber spends approximately 80 percent of his time on duties relating to plumbing and pipefitting. The parties stipulated that Garber spends 10 percent of his time performing work that is classified as office work and the remaining 10 percent of his time is spent in work that is not classified.

When Garber needs materials, he submits a written material requisition form to the Employer's purchasing agent. On a rare occasion, he has gone to the warehouse to pick up the materials. Occasionally, Garber goes to the office to talk with the Project Manager. The amount of time in the office varies with the job to which he is assigned.

Garber testified that he has heard a rumor that some people thought that he was an owner of the company. He denied that he has any current or past ownership in the company or any financial interest in the company.

Don Sturgill acknowledged that Garber was a journeymen plumber and shared the same job title. Sturgill asserted, however, that Garber "had more accessibility to different apparatuses," and also more say in his job and "just more power." Sturgill contended that Garber could get additional materials for his jobs without having to call in to the office. He asserted that Garber went to job sites and reported back to Tim Stewart or Gerald Miller as to whether the work looked satisfactory. On cross-examination he acknowledged that he had no direct knowledge of Garber's doing so and he had never been told by either Garber or Miller that Garber made such an inspection. Sturgill also admitted that Garber had never visited any of his work sites and told him what he was to do.

Garber explained that because of his experience as a plumber, he is occasionally asked about the design of certain components in a system. He acknowledged that he has seen a system that was installed improperly and he recommended to the field superintendent that it be corrected. He reviewed the system in response to the direction of the field superintendent. He has no knowledge as to whether the system was changed in response to his recommendation.

Garber confirmed that he had always done a good job for the company and has always had good reviews and raises. He acknowledged that he is not only very loyal to the Employer but also to Gerald Miller. When asked by the Union Representative if he would do whatever he could to help Gerald Miller and his company, Garber credibly responded that it

would depend on the issue at hand. He asserted, however, that he would not lie.

Contrary to counsel for the Union's argument, there is no evidence that Garber determined overtime, fired, or suspended employees. The only evidence of Garber's terminating an employee is the hearsay and uncorroborated testimony of Bret Copeland. On direct examination and through a leading question by Union Representative Paul Long, Copeland testified that Garber had once told him that he fired an employee. Copeland quickly added: "I don't know of anybody that he has." Garber credibly denied telling Copeland that he had fired employees.

The Union also argues that Garber held a special status with the Employer because during the course of Garber's employment prior to 2000, he received seven bonuses totaling $11,000 and because he received a truck as an incentive bonus. I do not find this argument persuasive. Kyle Slade testified that he worked as a foreman while employed by the employer. Slade confirmed that in 2002, he received a $700 bonus as a part of the Employer's bonus program. Inasmuch as Garber had been employed with the Employer for approximately 25 years prior to 2002, I do not find $11,000 to be a significant or even suspect bonus amount for the period of time in question.

There is no dispute that Garber is the most senior journeymen plumber in the Employer's employ. The evidence demonstrates that the Employer relied upon his experience and expertise in correcting and improving different operations. The fact that Garber may have used "judgment" in advising the Employer and less experienced employees in how to deal with or correct specific work problems, such direction is based upon a technical judgment involving skill and experience and not supervisory direction. Accordingly, the overall record does not support a finding that Dennis Garber is a supervisor within the meaning of the Act. I therefore recommend that his ballot be opened and counted.

c. Rodney Cremeans

The parties stipulated that from May 20, 2003, to the date of the election, Rodney Cremeans was the Fab Shop Foreman. For the time period in issue, Nick Chambers, Jim Meyers, and Don Hoffman were only other employees in the Fab Shop with Cremeans. He assigns work to the other employees in the Fab Shop and does so based upon their capabilities. While Cremeans has keys to the Fab Shop, he does not have keys to the office. As with the foremen in the field, Cremeans signs employee time cards. He submits the time cards to Lance Miller after he has signed them.

Cremeans denies that he has not solely interviewed employees, although he participated in two or three employment interviews. He recalled that he was present when Lance Miller interviewed Don Hoffman. Following the interview, he gave Miller his input and recommended that Hoffman be hired. Cremeans recalled that he also sat in on another interview and recommended that the employee be hired. The decision was made to hire the applicant. He not only determines when overtime is needed in the Shop, but also determines which employees will work overtime. While he does not keep personnel records at his work-table, he keeps attendance records for employees. Cremeans acknowledged that he maintained a discipline log for employee Don Hoffman. He has given a copy of the log to Hoffman. Cremeans also identified a memo dated November 19, 2003 containing an assessment of Jim Meyers' work performance and conduct in the Fab Shop. He gave a copy

of the memo to Lance Miller and also to Meyers. He recalled that he counseled[23] with Meyers concerning the subject matter of the memo.

The record reflects that Cremeans functions similarly to other foremen in many respects and I note that there were only three employees in the area for which he was responsible. Based upon his own testimony and the record evidence, however, it appears, that he exercises supervisory authority as defined in Section 2(11) of the Act. An individual need only posses one of these indicia of supervisory authority as long as it is carried out in the interest of the employer, and requires the use of independent judgment. *Arlington Masonry Supplies, Inc.,* 339 NLRB No. 99, slip op at 2 (2003). It appears that he has effectively recommended and has used his independent judgment in disciplining employees. Accordingly, I find that Cremeans is a supervisor within the meaning of the Act and I recommend that the challenge to his ballot be sustained and his ballot should remain closed.

2. Sheet Metal Challenges

The Union challenged the ballots of Doug Bloemker, Larry Hutton, and Jason Waters, contending that these individual were sheet metal workers who rarely perform plumbing and pipe work and, as such, are not appropriately a part of the bargaining unit. Citing *Air Liquide American Corp.,* 324 NLRB 661 (1997) and *Berea Publishing Co*., 140 NLRB 616, 519 (1963), the Employer argues that these individuals were dual-function employees and as such were eligible to vote in the election. In its decision in *Air Liquide American Corp.*, the Board held that the test for determining whether a dual-function employee should be included in a unit is "whether the employee [performs unit work] for sufficient periods of time to demonstrate that he … has a substantial interest in the unit's wages, hours, and conditions of employment." Based upon the employee's testimony, the Board found that for the relevant time period, the employee in issue spent over three-fourths of his time performing unit work.

As noted in its decision[24] in *Harold J. Becker Co., Inc*., 343 NLRB No. 11, slip op. at 1 (2004), the Board has no bright line rule as to the amount of time required to be spent performing unit work but rather makes this determination according to the facts of each case. The Employer initially hired Larry Hutton in February 1998. While he left for a nine-month period in 2001, he continues to work for the Employer. He described his work as setting equipment for boilers, chillers, and VAV boxes, as well as installing sheet metal and ducts. Hutton participated in a four-year HVAC apprentice program. Hutton estimated that he spends 50 percent of his time installing ductwork. He testified that he has not done any piping work for the previous six to eight months. While he testified that prior to the election he did some piping, he did not identify the percentage of his time spent in piping work compared to sheet metal work. The Union submits that the Employer's certified payroll records for the pertinent period prior to the election lists Hutton's classification as sheet metal.

The Employer employed Jason Waters as a sheet metal apprentice[25] from January

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[23] Interestingly, Meyers is Cremeans' brother.

[24] Citing *Martin Enterprises*, 325 NLRB 714, 715 (1998).

[25] Waters explained that he was learning the sheet metal trade but was not in an apprentice program.

2003 until approximately July 2004. He testified that he was hired as a Service Trainee and then transferred to the Sheet Metal Department. He described his work as mainly sheet metal including hanging sheet metal ductwork. He estimated that he spends five to six percent of his time performing piping work. He testified that his time sheets do not accurately reflect the work he performed because his foreman, Doug Bloemker, often completed the time sheets for him. In completing the time sheets, Bloemker erroneously listed hours in a piping classification rather than sheet metal in order to make it appear that the piping department was generating more hours.

Doug Bloemker was a sheet metal foreman during the pertinent time period prior to the election. The Employer argues that Bloemker is a dual function employee because he performed some piping work. Bloemker no longer works for the Employer and did not appear to testify during the hearing. The evidence reflects that he worked as a piping foreman on only one job and was replaced after complaints by the general contractor. In a letter to the Employer, the general contractor contended that the site foreman was not doing his job and opined that he did not portray a strong piping background.

The Employer argues that because these employees are dual-purpose employees, a community of interest standard should be applied in determining their inclusion in the unit. Normally the factors to be considered in applying a community-of-interest standard include: distinctions in the skills and functions of particular employee groups, their separate supervision, the employer's organizational structure, differences in wages and hours, integration of operations, interchange and contacts. *Desert Palace Inc*., 337 NLRB 1096, 1100 (2002).

The Board has long held that, when resolving determinative challenged ballots in cases involving stipulated bargaining units, its function is to determine the parties' intent and then to establish whether this intent is contrary to any statutory provision or established Board policy. *Northwest Community Hospital*, 331 NLRB 307 (2000). If the objective intent of the parties is expressed in clear and unambiguous terms in the stipulation, the Board will hold the parties to their agreement. *Ibid.* A determination of voter eligibility based on community-of-interest principles is appropriate only if the parties' intent is unclear and the stipulated unit is ambiguous. *McFarling Foods, Inc*., 336 NLRB 1140 (2001). *Space Mark*, 325 NLRB 1140, 1140 fn. 1 (1998).

Prior to the election, the parties stipulated to the following inclusions and exclusions with regard to the unit:

> All pipefitters, pipe welders, licensed plumbers, unlicensed plumbers, plumber helpers and plumber apprentices employed by the Joint the employers working at or out of their 4263 State Route 48, Covington, Ohio facility, but excluding all office clerical employees, professional employees, all other crafts, and all guards and supervisors as defined in the Act.

The Board has determined that where a stipulation includes certain job classifications and expressly excludes "all other employees," it will find a clear intent to exclude those classifications not matching the stipulated bargaining unit description. *Pierce-Phelps, Corp. Inc.,* 341 NLRB No. 78 (2004). Accordingly, I find that the parties' intent to exclude the sheet metal employees was clear and I find no provision of the Act or any established Board policy

that would contravene their exclusion. Additionally, I do not find that these employees as sheet metal employees share a sufficient community of interest with the stipulated bargaining unit employees. Accordingly, I recommend that the Board sustain the challenges to the ballots of Doug Bloemker, Jason Waters, and Larry Hutton.

3. Service Department Challenges

The Union challenged the ballots of Jeff Organ, Richard Wise, Stuart Folck, and Chris Mundy, contending that these individuals are service department HVAC and electrical employees who rarely perform plumbing and pipe work and as such should not be included in the bargaining unit.[26]

The Employer acknowledges that these four employees are employed in the Employer's Service Department and are directly supervised by the Service Manager Dick Poepplemeier. Unlike the plumbers and pipefitters, service employees wear uniforms, participate in a rotating "on-call" arrangement, and often use time sheets that are different from those used by the plumbers and pipefitters.

The parties stipulated that Jeff Organ and Stuart Folck perform substantially similar work to that performed by Richard Wise with regard to hours scheduled, supervision, travel time, paperwork, tools, benefits, title, trade or craft, and all other terms and conditions of employment for the relevant period prior to the election. Wise, who identified himself as a service technician, testified that while he does some plumbing and sheet metal work, a majority of his time is spent in heating and refrigeration. Wise has a refrigeration license, but no plumbing license. While he does some work on preventive maintenance contracts in the spring and fall, he otherwise handles service calls. For the period of time from early 2003 until the time of the election, his work in new construction involved installing controls for the air handles and chillers. While there are occasions when Wise is loaned to new construction, the majority of his work time involves service and warranty work.

The service manager typically dispatches the service technicians to their jobs. Jamie Chronabery served as a project manager for the Employer from August 2002 until December 2004. He testified that he never saw Wise, Mundy, or Organ perform any plumbing or pipefitting work. Chris Mundy testified that he considered his work as a service technician to be a trade.

In addition to claiming that Mundy's job duties as a service department employee excluded him from the unit, the Union has also alleged that Mundy's status as the former son-in-law of Gerald Miller afforded him a special status within the company. The Employer has employed Mundy on two separate occasions. His last period of employment was from August 2003 until February 2004. The record reflects that during his last period of employment, he performed the same duties as Folck, Wise, and Organ. There was no

[26] I note that the parties stipulated that during the relevant period prior to the election, Marvin Hoblitt, Stuart Folck, Chris Mundy, Richard Wise, and Chad Whitaker were employees of the Service Department. The Union attached a copy of the Excelsior List to its post-hearing brief. While the list contains Whitaker's and Hoblitt's name, there is no evidence that these individuals were challenged during the election. The record contains testimony that Hoblitt had experience or training in plumbing.

record evidence that Mundy received any special privileges or benefits that were not shared by other service department employees. I find no record evidence to support that Mundy had any status that was different than the other challenged service department employees.

The overall evidence reflects that while the service department employees perform some plumbing and pipefitting duties, a greater amount of their time is devoted to setting up, testing, repairing, replacing, and servicing the heating, air conditioning, and ventilating mechanical equipment. While there are occasions when service department employees work on the same job sites with plumbers and pipefitters, there is no evidence of joint supervision. The record does not demonstrate that service employees share a commonality of skills and common functions with plumbing and pipefitting employees. The Union petitioned to represent all pipefitters, pipe welders, pipe helpers, licensed plumbers, unlicensed plumbers, plumber helpers and plumber apprentices employed by the Employer, with the exclusion of all other crafts. The evidence reflects that the petitioned-for unit is a clearly functionally distinct group from the service department employees who do not have a sufficient community of interest for inclusion in the unit. Accordingly, I find that the evidence supports the Union's challenge for Mundy, Wise, Organ, and Folck. I recommend that the Union's challenges be sustained.

4. The Challenge to the Ballot of James Meyer

Because shop employees fabricate the pipe installed by the bargaining unit employees, assist bargaining unit employees in the fieldwork, and perform similar welding and cutting work, the parties agree that the shop employees should be included in the bargaining unit. The Union challenges the ballot of shop employee James Meyer, however, contending that he did not perform any bargaining unit work prior to the election. The Employer asserts that Meyer was hired as a full-time pipe welder and is eligible to vote.

Meyers worked for the Employer from August of 2003 until May 2004. Meyers confirmed that he is now a member of the Union and he was called as a witness for the Union. Meyers testified that he first heard about the job at the Employer's facility from his brother, Rod Cremeans. Prior to talking with his brother, he had never fabricated pipe. He recalled that Cremeans told him that he would like for him to do basic structural fabrications as well as to build racks and cut pipe. While Meyers did not have previous experience in pipe fabrication, he had worked in fabrication for other employers. Meyers applied for a job as a welder and interviewed with Lance Miller. During the interview, Miller told him that he would start with fabrication duties and work into the piping process.

The Employer argues that at the time of the election, the only four employees who were employed in the pipe fabrication shop were Donald Hoffman, Nick Chambers, Cremeans, and Meyer. Neither Hoffman nor Chambers were challenged in the election. Cremeans was challenged by the Union on the basis of his alleged supervisory status. Meyer testified that prior to the election, there were occasions when he cut, drilled, and beveled steel pipe. He recalled that he was also involved in sawing, cutting, and hanging pipe for Lance Miller's construction of a mock boiler room for one of the construction projects. Meyer confirmed that his duties included measuring, beveling, drilling, and loading pipe. Meyer confirmed that both Hoffman and Chambers did the same work that he did, however, they were more experienced. Inasmuch as Meyer performed the same work as the other non-challenged employees in the pipe fabrication shop, I find that he has a sufficient

community of interest with the unit employees. Accordingly, I recommend that his ballot be opened and counted.

5. The Challenge to the Ballots of Mark Eaton and Joshua Lee

The Board challenged the ballots for Mark Eaton and Joshua Lee because their names did not appear on the voter eligibility list. Inasmuch as I have concluded that the Employer unlawfully terminated these individuals, I shall overrule the Board's challenge to these ballots. *Ms.Deserts*, *Inc*., 299 NLRB 236, 237 fn. 8 (1990). I recommend that their ballots be opened and counted.

B. Resolution of the Union's Objections

In his Order Directing Hearing, Order Consolidating Cases, Order Transferring Cases to the Board and Notice of Hearing, the Acting Regional Director for Region 9 concluded that the Union's objections raise substantial and material issues affecting the results of the election and further concluded that the alleged conduct, if established, would constitute grounds for setting aside the election. Specifically, objections 1,2,3,10,14,19,22,25,26,27,28,31,36,37,42 and 44 would be resolved through an administrative hearing.[27] In its Decision and Order dated August 27, 2004, the Board adopted the Acting Regional Director's decision and recommendation.

Each of the objections set for hearing tracked the complaint allegations that have been discussed above. The violations of 8(a)(1) and (3) that I have found herein, which were also alleged as objections to the election, were sufficiently serious to disturb the laboratory conditions that the Board seeks for fair elections and to require that the election of October 31, 2003 be set aside. *General Shoe Co*., 77 NLRB 124 (1948). The Board has long held that "conduct violative of 8(a)(1) is, a *fortiori*, conduct which interferes with the exercise of a free and untrammeled choice in an election." *Dal-Tex Optical Co*., 137 NLRB 1782, 1786 (1962). The only recognized exception to this policy is where the violations are such that it is "virtually impossible to conclude that they could have affected the results of the election." *Super Thrift Markets, Inc*., 233 NLRB 409, 409 (1977). The determination is based upon such factors as the number of violations, their severity, the extent of dissemination, the size of the unit, and other relevant factors. *Ibid* at 409.

I have found that during the critical period coercive statements were made to 13 separate employees in a unit of approximately 51 eligible voters. As the record reflects, many of these 13 employees were the recipients of multiple coercive statements by more than one management official. Gerald Miller, who owns the company, is found to have engaged in the majority of the 8(a)(1) conduct. Gerald Miller's son, Lance Miller, and Field Superintendent Tim Stewart are also found to have engaged in multiple incidents of 8(a)(1) activity. The remainder of the 8(a)(1) conduct is attributed to project manager Dinlinger, and lower level supervisors Crail and Cremeans. The coercive statements involved high-ranking officials of the company who engaged in a number of interrogations, as well as threats of discontinuing the plumbing operation and the loss of jobs if the Employer had a bargaining

[27] The Acting Regional Director approved the Union's withdrawal of objections 4,5,6,7,8,9,11,12,13,15,16,17,18,20,21,23,24,29,30,32,33,34,35,38,39,40,41 and 43.

relationship with the Union. During the critical period, the Employer also terminated two employees because they were suspected to have supported the Union.

Based upon my findings above, I conclude that the unfair labor practices committed by the Employer during the critical period constituted objectionable conduct[28] that interfered with the free choice of employees in the election. Clearly, the Employer's conduct warrants the setting aside of the election and the direction of a second election. Therefore, I recommend that the election in 9-RC-17840 be set aside and I recommend the direction of a new election.

Conclusions of Law

1. The Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Employer violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Interrogating employees concerning their union activity and the union activity of other employees.

(b) Telling employees and applicants that the Employer was not hiring because of the union's organizational activities.

(c) Threatening that the Employer would discontinue its plumbing operation if the employees selected the union as their bargaining representative.

(d) Telling employees the identify of other employees who were engaging in union activities, thereby creating an impression among its employees that their union activities were under surveillance by the Employer.

(e) Asking an employee to ascertain and disclose to the Employer the union sympathies and activities of other employees.

(f) Telling employees that their reviews were postponed or delayed because of their union organization activity.

(g) Informing employees that the Employer knew the total number and names of employees who signed union authorization cards and thereby creating the

[28] Merit is found to Union objections 1,2,10,19,22,26,27,28,31, and 36 as this objectionable conduct correlates to the conduct that is found unlawful as alleged in the amended complaint.

impression among employees that their union activities were under surveillance by the Employer.

(h) Impliedly threatening employees with loss of jobs and replacement by union members if the union won the election.

(i) Telling employees that the Employer threw out applications for employment submitted by union members.

(j) Telling an employee to "watch his back" because of his activities on behalf of the union.

(k) Telling employees that the Employer discharged an employee because of he engaged in activities on behalf of the union.

(l) Soliciting employee complaints and grievances by the installation of an employees' suggestion box.

(m) Isolating pro-union employees through their work assignments.

(n) Discharging employees because they engaged in union or other protected activities.

(o) Refusing to hire and refusing to consider for hire applicants because of their membership in or support for the union.

(p) Reassigning its employees to more arduous and less agreeable job assignments because of their union sympathies or other protected activity.

The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Employer has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Employer, having discriminatorily discharged employees Mark Eaton and Joshua Lee, must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

It having been found that the Employer unlawfully discriminated against job applicants including Kelly Brennan, Greg Bush, Scott Shouse, Victor Tanner, Anthony De Brosse, Matt Seibert, Walter Lipinski, and Mike O'Hearn, based upon their union membership and affiliation, it is recommended that the Employer be ordered to offer them employment and

make them whole for any loss of earnings they may have suffered, as determined in compliance proceedings in the manner set forth in *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) and that the duration of the remedy be left to the compliance stage of this proceeding. *Eldeco Inc*., 321 NLRB 857, 858 (1996); *Casey Electric*, 313 NLRB 774, 775 (1994).

In his brief, Counsel for the General Counsel requests that as a part of the remedy, the Order should require that a responsible management official at the Employer's Covington, Ohio facility, or a Board agent in the presence of such official, read aloud the Notice to Employees. I agree with Counsel for the General Counsel that the facts of this case require additional remedies. As discussed above, the majority of the unfair labor practices found were committed by the Employer's owner and highest management officials. The unfair labor practices included terminating, isolating, and reassigning employees because of their support for the Union. Additionally, the Employer is found to have engaged in numerous incidents of conduct involving interrogation and threats of closure of the plumbing and piping operation. Inasmuch as such conduct is likely to effect employees' exercise of their Section 7 rights, including their right to choose in a subsequent Board election whether the Union is to represent them, an appropriate remedy includes the reading of the proposed notice. *Harbor Cruises, Ltd*., 319 NLRB 822 (1995); *Fieldcrest Cannon, Inc*., 318 NLRB 470, 473 (1995).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended:[29]

ORDER

The Employer, GM Mechanical, Inc. and Stillwater Services, Inc., joint employers, Covington, Ohio, its officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Interrogating employees concerning their support for the union and concerning other employees' support for the union.

(b) Threatening employees that it would discontinue or close its plumbing operation.

(c) Telling employees and applicants that it is not hiring because of the union's organizational activities.

(d) Telling employees the identify of employees who are engaging in union activities and thereby creating an impression among its employees that their union activities are under surveillance.

[29] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Asking employees to ascertain and disclose to the Employer the union sympathies and activities of other employees.

(f) Telling employees that their reviews are postponed or delayed because of their union organization activity.

(g) Informing employees that the Employer knows the total number and names of employees who signed union authorization cards and thereby creating the impression among its employees that their union activities are under surveillance by the Employer.

(h) Impliedly threatening employees with loss of jobs and replacement by union members if the union won the election.

(i) Telling employees that the Employer threw out applications for employment submitted by union members.

(j) Telling employees to "watch their back" because of their activities on behalf of the Union.

(k) Telling employees that the Employer discharged employees because they engaged in activities on behalf of the Union.

(l) Soliciting employee complaints and grievances by installing an employee suggestion box.

(m) Isolating pro-union employees through their work assignments.

(n) Discharging employees because they engaged in union or other protected activity.

(o) Refusing to hire and refusing to consider for hire applicants because of their membership in or support for the union.

(p) Reassigning its employees to more arduous and less agreeable job assignments because of their union sympathies or other protected activity.

(q) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 14 days from the date of this Order, offer Mark Eaton and Joshua Lee full reinstatement to their former jobs, or if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed and offer instatement to Kelly Brennan, Greg Bush, Scott Shouse, Victor Tanner, Anthony DeBrosse, Matt Seibert, Walter Lipinski, and Mike O'Hearn in the positions for which they applied, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

Make Mark Eaton, Joshua Lee, Kelly Brennan, Greg Bush, Scott Shouse, Victor Tanner, Anthony DeBrosse, Matt Seibert, Walter Lipinski, and Mike O'Hearn whole for any loss of earnings and any other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of this decision.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire or to consider for hire Kelly Brennan, Greg Bush, Scott Shouse, Victor Tanner, Anthony DeBrosse, Matt Seibert, Walter Lipinski, and Mike O'Hearn and the unlawful discharges of Mark Eaton and Joshua Lee and within three days thereafter notify them in writing that it has done so and that the personnel actions will not be used against them in any way.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Covington, Ohio copies of the attached notice marked "Appendix."[30] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Employer's authorized representative, shall be posted by the Employer immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Employer to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Employer has gone out of business or closed the facility involved in these proceedings, the Employer shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Employer at any time since early August 2003.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Employer has taken to comply.

IT IS FURTHER RECOMMENDED that the election in Case 9-RC-17840 be set aside and the case remanded to the Regional Director for Region 9 to conduct a new election when he deems the circumstances permit the free choice of a bargaining representative.[31]

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[30] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

[31] On January 19, 2005, the Employer filed a Motion to Have Petition For Representation Election Voided. This motion was denied by the Regional Director for Region 9 on January 20, 2005. On February 2, 2005, the employer filed with the Board, a Motion To Have Petition For Representation Election Voided And/Or Motion For Special Permission To Appeal Ruling Of Regional Director and the motion is pending before the Board.

Dated, Washington, D.C.

Margaret G. Brakebusch
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT coercively question you about your union support or activities or the union support or activities of other employees.

WE WILL NOT tell you or employment applicants that we are not hiring because of the union's organizational activities.

WE WILL NOT threaten to discontinue our plumbing operation if you select the union as your bargaining representative.

WE WILL NOT tell you the identity of other employees who are engaging in union activities and thereby create an impression among you that your union activities are under surveillance.

WE WILL NOT ask you to ascertain and disclose the union sympathies and activities of other employees.

WE WILL NOT tell you that your reviews are postponed or delayed because of your union activities.

WE WILL NOT tell you that we know the number and names of employees who signed union authorization cards and thereby create an impression among you that your union activities are under surveillance.

WE WILL NOT impliedly threaten you with job loss or replacement by union members if you select the union as your bargaining representative.

WE WILL NOT tell you that we have thrown out applications for employment submitted by union members.

WE WILL NOT tell you to "watch your back" because of your actives on behalf of the union.

WE WILL NOT tell you that we have discharged employees because they engaged in activities on behalf of the union.

WE WILL NOT solicit employee complaints and grievances by installing an employee suggestion box.

WE WILL NOT discharge employees because they support the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 162, AFL-CIO or any other union.

WE WILL NOT isolate pro-union employees by their work assignments.

WE WILL NOT refuse to hire or refuse to consider for hire applicants because of their membership in or support for the Union.

WE WILL NOT reassign you to more arduous and less agreeable job assignments because of your union sympathies or other protected activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Mark Eaton and Joshua Lee and the refusal to hire or to consider for hire Kelly Brennan, Greg Bush, Scott Shouse, Victor Tanner, Anthony DeBrosse, Matt Seibert, Walter Lipinski, and Mike O'Hearn and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that the discharges and our failure to hire or to consider for hire will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Mark Eaton and Joshua Lee full reinstatement to their former jobs, or if those jobs no longer exists, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL, within 14 days from the date of the Board's Order, offer instatement to Kelly Brennan, Greg Bush, Scott Shouse, Victor Tanner, Anthony DeBrosse, Matt Seibert, Walter Lipinski, and Mike O'Hearn to the positions for which they applied, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights

WE WILL, make Mark Eaton, Joshua Lee, Kelly Brennan, Greg Bush, Scott Shouse, Victor Tanner, Anthony DeBrosse, Matt Seibert, Walter Lipinski and Mike O'Hearn whole for any loss of earnings and other benefits resulting from our unlawful discharges or our unlawful failure to hire or to consider for hire, less any net interim earnings, plus interest.

GM MECHANICAL, INC., AND STILLWATER SERVICES, INC., JOINT EMPLOYERS

(The Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and union. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

550 Main Street, Federal Office Building, Room 3003, Cincinnati, OH 45202-3271
(513) 684-3686, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (513) 684-3750.